Dato' Seri Anwar bin Ibrahim v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NOS W–05–64 OF 2000 AND W–05–65 OF 2000
PS GILL, RICHARD MALANJUM AND HASHIM YUSOFF JJCA
21 AUGUST 2003

Evidence — Confession — Retracted confession — Whether retracted confession could constitute corroboration

Evidence — Corroboration — Sexual offence — Requirement for corroboration or corroboration warning — Absence of protect when accused told of charges against him — whether conduct of accused could constitute corroboration

Evidence — Witness — Credibility — Material contradictions in statements made by witness — Whether such contradictions sufficiently explained — Whether credit of witness impeached — Whether witness credible

Criminal Law — Penal Code s 377B — Carnal intercourse against the order of nature — Absence of immediate complaint — Whether complainant an accomplice — Whether testimony of complainant ought to have been corroborated

Criminal Procedure — Impeachment — Procedure — Witness' testimony not impeached — Whether trial judge erred in not impeaching witness — Whether appellate court ought to disregard testimony of witness

In a statutory declaration sworn in 1997, Azizan Abu Bakar ('Azizan') claimed that some time in 1992 the second appellant invited him to the second appellant's apartment of at Tivoli Villa in Kuala Lumpur. On his arrival, he was found the first appellant there. He was invited into a room where he was sodomized in turn by the first and second appellants. There was no immediate complaint lodged by Azizan. In proceedings before another judge, Azizan emphatically stated that he was not sodomised by the first appellant after September 1992. The first and second appellants were charged with having committed carnal intercourse against the order of nature. The second appellant was additionally charged with abetment of the offence by the first appellant. On the application of the prosecution, the date of the offence charged was amended from May 1994 to May 1992. When the second appellant served a notice of alibi on this charge, the charge was further amended to read as having been committed sometime 'between the months of January to March 1993'. Objections against the amendments to the respective charges were overruled by the trial judge. The defence then tendered evidence from previous proceedings wherein Azizan testified that he was never sodomised by the appellants after September 1992 and sought to have his credibility impeached. The court found that, even assuming that there had been a material contradiction, it was more than satisfied that Azizan has successfully explained the contradiction. The impeachment proceeding failed and Azizan's credit was saved and, in fact and in substance Azizan was a truthful witness. At the conclusion of the hearing, the trial judge convicted the appellants. The appellants appealed, inter alia, on the absence of corroborative evidence of the sexual offence and on the acceptance by the trial judge of Azizan as being a credible witness despite the contradictory

statements he made in respect of the dates when the alleged offences were committed. A

Held, dismissing the appeals:

(1) A sexual offence is a charge that is easy to make but difficult to refute. It usually involves no independent witness, present 'like a fly on the wall observing the incriminating episode described' by the complainant. Invariably the truth or falsity of such a charge would depend on the version accepted by the court. The credibility of the complainant as a witness was of paramount importance. The evidence, particularly the evidence of the complainant, must be convincing. This explains the need for corroboration, or at least a warning of the dangers of convicting on the uncorroborated evidence of such a witness (see para 79); *PP v Mardai* [1950] MLJ 33 and *Chiu Nang Hong v PP* [1965] 1 MLJ 40 referred. B C

(2) In impeachment proceedings, it is the trial judge who has the advantage of listening and seeing the demeanour of the witness giving his explanation for his inconsistent statements. Hence, the trial judge's acceptance of the explanation should be given significant consideration. The trial judge accepted Azizan's explanation for the seemingly contradictory statements given. There was nothing wrong with the conclusion of the trial judge in not impeaching Azizan's credit. The trial judge's decision, having been based on the comparative reliability of witnesses, it was not now open an appellate court to interfere with that decision (see para 96); *Ooi Choon Lye v Lim Boon Kheng & Ors* [1972] 1 MLJ 153 followed. D E

(3) The trial judge had ensured that Azizan was duly scrutinized as a witness. He allowed impeachment proceedings to be conducted so that all parties could be heard on the apparent discrepancies in the Azizan's statements and testimonies. He did not just rule the discrepancies minor and requiring no further proceeding but, instead, went into a detailed examination of the evidence given. On the issue of whether to accept or reject the evidence of a witness, the real tests are: how consistent the story is with itself, how it stands the test of cross-examination and how far it fits in with the rest of the evidence and the circumstances of the case. The Court of Appeal was unable to say that the learned trial judge was plainly wrong in coming to his findings as he did. As an appellate court, the Court of Appeal should be slow in substituting its own assessment of Azizan as a witness (see para 113); *Periasamy s/o Sinnappan & Anor v PP* [1996] 2 MLJ 557 (CA) followed; *Bhojraj v Sita Ram* AIR 1936 PC 60 and *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor* referred. F G H

(4) The word corroboration had no special technical meaning. By itself, it means no more than evidence tending to confirm other evidence. Thus, whether or not the conduct and statement of an accused person has the effect of being corroborative evidence is for the trial court to consider. The act of the first appellant in asking Azizan to deny the I

content of P5 was corroborative evidence. Similarly, the act of first appellant in instructing SAC1 Musa to cease investigation in connection with the police report lodged earlier on by ASP Aznam. It was reasonable to make an inference from such unchallenged facts that such conduct had an ulterior motive and was done for the benefit of the first appellant, thus categorizing the same as 'evidence tending to confirm other evidence' although such evidence could not be said to be directly in relation to the offence as per the charge (see paras 120, 121–123); *Eade v The King* [1924] 34 CLR 154 followed.

(5) It is settled law that a confession on its own, even if subsequently retracted so long as the court is satisfied of its voluntariness and truth, can be a basis to convict an accused person. There is therefore is no reason why it cannot be good corroborative evidence (see p 196); *Osman & Anor v Public Prosecutor* [1967] 1 MLJ 137 (FC); [1968] 2 MLJ 137 (PC) and *Yap Sow Keong & Anor v Public Prosecutor* [1947] MLJ 90 followed.

(6) The trial judge held that the evidence of Dr Mohd Fadzil could not corroborate the evidence of Azizan as it 'does not confirm the story of Azizan that he was sodomized by both the accused'. While this may be correct from that perspective, in so far as it relates to the confession of the second appellant, it was definitely relevant. Thus on that score, we differ with the learned trial judge. Otherwise, we agree with his reasoning pertaining to the admissibility of the testimony of PW2 on other issues. Similarly, the first appellant did not protest when he was told to stop his wayward activity. Surely, one would have registered his disapproval to the assertion instead of just asking whether he would be subject to blackmail by the police (see paras 127, 129); *R v Chandler* [1976] 1 WLR 585 (CA) referred.

(7) When an accomplice acts under a form of pressure, which would require some firmness to resist, reliance can be placed on his uncorroborated evidence. The evidence showed that Azizan was invited to visit the apartment by the second appellant. His actus reus alone was not sufficient to make him an accomplice, there must also be the intention on his part. Azizan went there to see the new apartment. He did not go there with the intention of committing sodomy with the appellants. Thus, the trial judge found that Azizan was not an accomplice and the Court of Appeal found no reason to differ from his conclusions (see para 132); *Ng Kok Lian & Anor v Public Prosecutor* [1983] 2 MLJ 379 followed.

[Bahasa Malaysia summary

Dalam satu deklarasi statutori yang telah disumpah pada 1997, Azizan Abu Bakar ('Azizan') telah mendakwa bahawa sekitar tahun 1992, perayu kedua telah menjemput beliau ke apartmen perayu kedua di Tivoli Villa di Kuala Lumpur. Ketika tiba di sana, beliau mendapati perayu pertama berada di situ. Beliau dijemput ke dalam sebuah bilik di mana beliau diliwat bergilir-

gilir oleh perayu-perayu pertama dan kedua. Tiada aduan segera dibuat oleh Azizan. Dalam prosiding di hadapan hakim lain, Azizan dengan tegas menyatakan bahawa beliau tidak diliwat oleh perayu pertama selepas bulan September 1992. Perayu-perayu pertama dan kedua dituduh melakukan hubungan jenis bertentangan dengan hukum alam. Perayu kedua juga dituduh bersubahat dengan kesalahan oleh perayu pertama. Dalam permohonan pihak pendakwa, tarikh kesalahan yang dilakukan telah dipinda dari bulan Mei 1994 ke bulan Mei 1992. Apabila perayu kedua menyampaikan notis alibi ke atas pertuduhan ini, pertuduhan tersebut seterusnya dipinda agar dibaca sebagai telah dilakukan 'between the months of January to March 1993'. Bantahan-bantahan terhadap pindaan-pindaan kepada pertuduhan-pertuduhan masing-masing itu telah ditolak oleh hakim perbicaraan. Pihak pembela kemudian telah metenderkan keterangan daripada perosiding sebelumnya di mana Azizan membuat keterangan bahawa beliau tidak pernah diliwat oleh perayu-perayu selepas September 1992 dan memohon agar kebolehpercayaan beliau dicabar. Mahkamah mendapati bahawa, walaupun dengan andaian bahawa terdapat percanggahan yang material, ia lebih daripada berpuas hati bahawa Azizan telah berjaya menerangkan percanggahan tersebut. Prosiding mencabar tersebut telah gagal dan kebolehpercayaan Azizan dapat diselamatkan dan, secara fakta dan pada amnya, Azizan adlah seorang saksi yang jujur. Di akhir perbicaraan hakim perbicaraan telah menyabitkan perayu-perayu. Perayu-perayu telah merayu, antara lain, tentang ketiadaan keterangan menyokong kesalahan seksual tersebut dan tentang penerimaan hakim perbicaraan terhadap Azizan sebagai saksi yang boleh dipercayai walaupun kenyataan-kenyataan bercanggah yang beliau telah buat berkaitan tarikh-tarikh bila kesalahn-kesalahan tersebut telah dilakukan.

Diputuskan, menolak rayuan-rayuan tersebut:

(1) Satu kesalahan seksual adalah satu pertuduhan yang senang dibuat tetapi sukar disangkal. Ia biasanya tidak melibatkan satu-satunya saksi, yang hadir 'like a fly on the wall observing the incriminating episode described' oleh pengadu. Selalunya, kebenaran atau kepalsuan suatu pertuduhan akan bergantung kepada versi yang diterima oleh mahkamah. Kebolehpercayaan pengadu sebagai seorang saksi adalah amat penting. Keterangan tersebut, terutamanya keterangan pengadu, hendaklah meyakinkan. Ini menjelaskan perlunya sokongan, atau sekurang-kurangnya amaran tentnag bahaya-bahaya melakukan keterangan yang tidak disokong seorang saksi (lihat perenggan 79); *PP v Mardai* [1950] MLJ 33 dan *Chiu Nang Hong v PP* [1965] 1 MLJ 40 dirujuk.

(2) Dalam prosiding pendakwaan, ia adalah hakim perbicaraan yang mempunyai kelebihan mendengar dan melihat perilaku saksi memberian penjelasannya untuk kenyataan-kenyataannya yang tidak konsisten. Justeru itu, penerimaan hakim perbicaraan terhadap penjelasan tersebut hendaklah diberikan pertimbangan yang wajar. Hakim perbicaraan telah menerima penjelasan Azizan terhadap kenyataan-kenyataan yang kelihatan bercanggah yang diberikan. Tiada apa-apa

yang salah dengan keputusan hakim mahkamah yang tidak mencabar keboleh percayaan Azizan. Keputusan hakim mahkamah, yang berdasarkan kebergantungan komparatif saksi-saksi, ia sekarang tidak terbuka kepada mahkamah rayuan untuk campur tangan dengan keputusan tersebut (lihat perenggan 96); *Ooi Choon Lye v Lim Boon Kheng & Ors* [1972] 1 MLJ 153 diikut.

(3) Hakim perbicaraan telah memastikan bahawa Azizan telah diteliti sewajarnya sebagai seorang saksi. Beliau dibenarkan prosiding pendakwaan dikendalikan agar semua pihak boleh didengar berhubung percanggahan-percanggahan nyata dalam kenyataan-kenyataan dan keterangan-keterangan Azizan. Belaiu tidak hanya memutuskan percanggahan-percanggahan tersebut sebagai remeh dan tidak memerlukan prosidng seterunya tetapi, sebaliknya, menjalankan satu pemeriksaan terperinci terhadap keterangan yang diberikan. Berhubung persoalan sama ada untuk menerima atau menolak keterangan seorang saksi, ujian-ujiannya adalah: sejauhmana konsisten cerita itu sendiri, bagaimana ia menghadapi ujian pemeriksaan balas dan sejauhmana ia selaras dengan keterangan lain dan keadaan-keadaan kes. Mahkamah Rayuan tidak dapat menyatakan bahawa hakim perbicaraan yang bijaksana dengan jelas terkhilaf apabila tiba kepada penemuannya sebagaimana yang beliau lakukan. Sebagai suatu mahkamah rayuan, Mahkamah Rayuan tidak sepatutnya campur tangan dalam mengubah penilaiannya terhadap Azizan sebagai seorang saksi (lihat perenggan 113); *Periasamy s/o Sinnappan & Anor v PP* [1996] 2 MLJ 557 diikut; *Bhojraj v Sita Ram* AIR 1936 PC 60 dan *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor* dirujuk.

4) Perkataan pencabaran tiada maksud teknikal yang khas. Dengan sendirinya, ia bermaksud tidak lebih daripada keterangan yang bertujuan untuk mengesahkan keterangan lain. Oleh itu, sama ada atau tidak perbuatan dan kenyataan yang tertuduh mempunyai kesan mencabar keterangan adalah untuk mahkamah perbicaraan pertimbangkan. Tindakan perayu pertama bertanyakan Azizan untuk menafikan kandungan P5 adalah keterangan mencabar. Sama juga, tindakan perayu pertama yang mengarah SAC1 Musa untuk hentikan siasatan berkaitan laporan polis yang dibuat sebelumnya oleh ASP Aznam. Ia adalah munasabah untuk membuat inferens daripada fakta-fakta yang tidak dicabar tersebut bahawa perbuatan sedemikian mempunyai motif sebaliknya dan dilakukan untuk manfaat perayu pertama, oleh itu mengkategorikan yang sama sebagai 'evidence tending to confirm other evidence' walaupun keterangan sedemikian tidak boleh dikatakan secara langsung berkaitan dengan kesalahan sepertimana dalam kertas pertuduhan (lihat perenggan-perenggan 120, 121–123); *Eade v The King* [1924] 34 CLR 154 diikut.

(5) Adalah undang-undang tetap bahawa satu pengakuan dengan sendirinya, walaupun dimasukkan kemudiannya selagi mahkamah berpuas hati tentang kerelaannya dan kebenarannya, boleh menjadi asas menyabitkan tertuduh. Tidak terdapat dengan itu sebab kenapa ia tidak boleh menjadi keterangan mencabar yang baik (lihat perenggan 196); *Osman & Anor v Public Prosecutor* [1967] 1 MLJ 137; [1968] 2 MLJ

137 dan *Yap Sow Keong & Anor v Public Prosecutor* [1947] MLJ 90 diikut.

(6) Hakim perbicaraan memutuskan bahawa keterangan Dr Mohd Fadzil tidak boleh mencabar keterangan Azizan kerana ia 'does not confirm the story of Azizan that he was sodomized by both the accused'. Meskipun ini adalah betul daripada perspektif tersebut, sejauhmana ia berkaitan dengan pengakuan perayu kedua, ia sememangnya relevan. Oleh itu, berdasarkan asas tersebut, Mahkamah Rayuan berbeza pendapat dengan hakim perbicaraan yang bijaksana. Sebaliknya Mahkamah Rayuan bersetuju dengan alasan beliau berkaitan penerimaan masuk keterangan PW2 berhubung persoalan-persoalan lain. Begitu juga, perayu pertama tidak membantah apabila beliau diminta memberhentikan kegiatan tidak terkawalnya. Pastinya, seseorang itu dapat merasakan rasa tidak setujunya tentang penegasan tersebut sebalik hanya bertanyakan sama ada beliau akan diugut oleh polis (lihat perenggan-perenggan 127, 129); *R v Chandler* [1976] 1 WLR 585 dirujuk.

(7) Apabila seorang rakan sejenayah bertindak di bawah satu bentuk tekanan, yang akan menghendaki sedikit ketegasan untuk melawan, kebergantungan terletak ke atsa keterangan tidak dicabarnya. Keterangan menunjukkan bahawa Azizan telsah dijemput melawat apartmen tersebut oleh perayu kedua. Actus reusnya sahaja tidak mencukupi untuk menjadikan beliau seorang rakan sejenayah, perlu juga ada niat di pihaknya. Azizan perdi ke sana untuk melihat apartmen baru tersebut. Beliau tidak pergi ke sana dengan niat untuk melakukan liwat dengan perayu-perayu. Oleh itu, hakim perbicaraan mendapati Azizan bukan seorang rakan penjenayahdan Mahkamah Rayuan tidak mendapati apa-apa alasan untuk mengubah keputusannya (lihat perenggan 132); *Ng Kok Lian & Anor v Public Prosecutor* [1983] 2 MLJ 379 diikut.]

Notes

For cases on corroboration on sexual offences, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 938–957.

For cases on credibility of witnesses, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2531–2556.

For cases on corroboration on sexual offences, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 938–957.

For cases on impeachment proceedings, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1702–1704.

For cases on the Penal Code s 377B, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) para 1614.

Cases referred to

Abdillah bin Labo Khan v PP [2002] 3 MLJ 298 (refd)
Abdul Ghani bin Ali @ Ahmad & Ors v PP [2001] 3 MLJ 561 (refd)
Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors [2002] 4 MLJ 327 (refd)
Apren Joseph v State of Kerala 1973 Cri LJ 185 (refd)

Basil bin Omar v PP [2003] 1 MLJ 192 (refd)
Bessela v Stern (1877) 2 CPD 265 (refd)
Bhandulananda Jayatilake v PP [1982] 1 MLJ 83 (refd)
Bhojraj v Sita Ram AIR 1936 PC 60 (refd)
Bhuboni Sahu v R AIR 1949 PC 257 (folld)
Chan Teng Cheong v PP [1967] 1 MLJ 217 (refd)
Chean Siong Guat v PP [1969] 2 MLJ 63 (refd)
Chin Seow Noi & Ors v PP [1994] 1 SLR 135 (refd)
Chiu Nang Hong v PP [1965] 1 MLJ 40 (refd)
Clarke v Edinburgh Tramways [1919] SC (HL) **35** (refd)
Dato' Mokhtar bin Hashim v PP [1983] 2 MLJ 232 (refd)
Dalip Bhagwan Singh v PP [1998] 1 MLJ 1 (folld)
Director of Public Prosecutions v Ping Ling [1975] 3 All ER 175; [1976] AC 547 (refd)
Eade v The King [1924] 34 CLR 154 (folld)
Ferguson v Weaving [1951] 1 KB 814 (refd)
Goh Leng Kwang v Teng Swee Lin & Ors [1974] 2 MLJ 5 (refd)
Hairani Sulong v PP [1993] 2 CLJ 79 (refd)
Herchun Singh & Ors v PP [1969] 2 MLJ 209 (folld)
Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors [1995] 2 MLJ 213 (refd)
Hussin bin Sillit v PP [1988] 2 MLJ 232 (refd)
Juraimi bin Hussin v PP [1998] 1 MLJ 537 (refd)
K Saravanan a/l S Karuppiah v PP [2002] 3 MLJ 465 (refd)
Kandasami v Mohamed Mustafa [1983] 2 MLJ 85 (refd)
Kashmira Singh State of Madhya Pradesh AIR 1952 SC 159 (folld)
Khoon Chye v PP [1961] MLJ 105 (refd)
Krishnan & Anor v PP [1981] 2 MLJ 121 (refd)
Ku Lip See v PP [1982] 1 MLJ 194 (refd)
Lai Kim Hon & Ors v PP [1981] 1 MLJ 84 (refd)
Law Kiat Lang v PP [1966] 1 MLJ 215 (refd)
Lee Weng Sang v PP [1977] 1 MLJ 166 (refd)
Lim Yow Choon v PP [1972] 1 MLJ 205 (refd)
Locabail (UK) Ltd v Bayfield Properties Ltd & Anor [2000] 1 All ER 65 (refd)
Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara [2002] 1 MLJ 321 (refd)
Ng Kok Lian & Anor v Public Prosecutor [1983] 2 MLJ 379 (folld)
Noliana bte Sulaiman v PP [2000] 4 MLJ 752 (refd)
Ooi Choon Lye v Lim Boon Kheng & Ors [1972] 1 MLJ 153 (folld)
Osman & Anor v PP [1967] 1 MLJ 137 (folld)
Periasamy s/o Sinnappan & Anor v PP [1996] 2 MLJ 557 (refd)
Powell and wife v Streatham Manor Nursing Home [1935] AC 243 (refd)
PP v Chong Boo See [1988] 3 MLJ 292 (refd)
PP v Datuk Haji Harun bin Haji Idris & Ors [1977] 1 MLJ 180 (refd)
PP v Datuk Tan Cheng Swee & Ors [1979] 1 MLJ 166 (refd)
PP v Fam Kim Hock [1957] MLJ 20 (refd)
PP v Foong Chee Cheong [1970] 1 MLJ 97 (refd)
PP v Lai Pong Yuen & Ors [1968] 1 MLJ 12 (refd)
PP v Lim Chen Len [1981] 2 MLJ 41 (refd)
PP v Lo Ah Eng [1965] 1 MLJ 241 (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
PP v Mansor bin Mohd Rashid & Anor [1996] 3 MLJ 560 (refd)
PP v Mardai [1950] MLJ 33 (refd)

PP v Nordin bin Johan & Anor [1983] 2 MLJ 221 (folld)
PP v Tee Tean Siong & Ors [1963] MLJ 201 (refd)
PP v Wan Razali Kassim [1970] 2 MLJ 79 (refd)
PP v Wong Yee Sen & Ors [1990] 1 MLJ 187 (refd)
Queen, The v Coney & Ors (1882) 8 QBD 534 (refd)
R v Chandler [1976] WLR 585 (refd)
R v Cram (1880) 14 Cox CC 390 (refd)
R v Gough [1993] 2 All ER 724 (refd)
RC Pollard v Satya Gopal Mazumdar AIR 1943 Cal 594 (refd)
Rangapula & Anor v PP [1982] 1 MLJ 91 (refd)
Rattan Singh v PP [1971] 1 MLJ 162 (refd)
Reg v Mitchell (1892) 17 Cox CC 503 (refd)
Regina v P (MB) 89 CCC (3d) 28 [1994] CCC Lexis 2454 113 DLR (4th) 461 (refd)
Ryan v Ross & Anor [1963] 2 QB 151 (refd)
Sambasivam v The PP, Federation Malaya [1950] MLJ 145 (refd)
Smyth v Ushewokunza & Anor [1997] SC (refd)
TN Nathan v PP [1978] MLJ 134 (refd)
Tara Singh & Ors v PP [1949] MLJ 88 (refd)
Teh Lee Tong v Rex [1956] MLJ 194 (refd)
Thavanathan a/l Balasubramaniam v PP [1997] 2 MLJ 401 (refd)
Ti Chuee Hiang v PP [1995] 2 MLJ 433 (refd)
Tinit & Ors v PP (No 2) [1964] MLJ 389 (refd)
Tunde Apatira & Ors v PP [2001] 1 MLJ 259 (refd)
Vasan Singh v PP [1988] 3 MLJ 412 (refd)
Wong Kim Leng v PP [1997] 2 MLJ 97 (refd)
Yaacob v PP [1966] 1 MLJ 67 (refd)
Yap Chai Chai & Anor v PP [1973] 1 MLJ 219 (folld)
Yap Sow Keong & Anor v PP [1947] MLJ 90 (refd)
Yuill v Yuill [1945] 1 All ER 183 (refd)

Legislation referred to

Criminal Procedure Code ss 2, 60(1), 103, 402A, 413A(1), 418A(1)
Evidence Act 1872 [India] s 30
Evidence Act 1950 ss 8, 91, 92, 114(g), 138
Penal Code ss 109, 377B
Syariah Criminal Offences (Federal Territories) Act 1997 s 25

Christopher Fernando (Karpal Singh, Gurbachan Singh, Pawan Chik Merican, Zulkifli Nordin, SN Nair and Marisa Regina with him) (SN Nair & Partners) for the first appellant.

Jagdeep Singh Deo (Gobind Singh Deo and Ram Karpal Singh with him) (Karpal Singh & Co) for the second appellant.

Deputy Public Prosecutor (Attorney-General's Chambers) for the respondent.

Appeal from: Criminal Trial Nos 45–51 of 1998 and 45–26 of 1999 (High Court, Kuala Lumpur)

PS Gil JCA (delivering judgment of the court):

INTRODUCTION AND DEFINITIONS

[1] There were two appeals jointly heard before us both against conviction and sentence. On 18 April 2003 we dismissed both the appeals and indicated that we would give our reasons later. We do so now.

[2] In this judgment unless otherwise stated the following terms, words, letters, and phrases bear their respective meanings assigned thereto or represent such items as defined:

(i) 'public prosecutor' includes the deputies public prosecutor appearing with him;

(ii) 'first appellant' means Dato' Seri Anwar Ibrahim;

(iii) 'second appellant' means Sukma Darmawan Sasmitaat Madja;

(iv) 'appellants' means the first appellant and second appellant;

(v) 'Azizan' is Azizan bin Abu Bakar denoted by identification of 'SP6' in the court below or 'PW6' in this judgment;

(vi) 'these appeals' means both the appeals of the first appellant and second appellant;

(vii) 'this present case' means the appeals under consideration by the Court of Appeal;

(viii) 'learned counsel for the first appellant' includes Mr Christopher Fernando; Mr Karpal Singh; Mr Gurbachan Singh; Mr Pawan Chik Merican; Mr Zulkifli Nordin; Mr SN Nair and Ms Marisa Regina;

(ix) 'learned counsel for the second appellant' includes Mr Jagdeep Singh Deo; Mr Gobind Singh Deo and Mr Ram Karpal Singh;

(x) 'prosecution' means the public prosecutor in the court below;

(xi) 'defence' means the appellants in the court below;

(xii) 'May 1992 charge' refers to the charges preferred against the appellants which carried the date of the alleged incident to be in May 1992;

(xiii) 'CJA' means the Courts of Judicature Act 1964 as amended;

(xiv) 'EA 1950' means the Malaysian Evidence Act 1950 as amended;

(xv) 'CPC' means the Malaysian Criminal Procedure Code as amended;

(xvi) 'Penal Code' means the Malaysian Penal Code as amended;

(xvii) 'Court below' means the High Court which heard this present case;

(xviii) 'the first trial' means the trial of the first appellant under Kuala Lumpur High Court Criminal Trial Nos 45–48–98 and 45–49–98 on a charge under Emergency (Essential Powers) Ordinance No 22 of 1970;

(xix) 'PW' signifies witness for the prosecution and is in substitution for 'SP' in the court below; and

(xx) 'DW' signifies witness for the appellants and is in substitution for 'SD' in the court below;

[3] In the first appeal, the first appellant appealed against his conviction and sentence on a charge preferred against him for an offence punishable under s 377B of the Penal Code. On conviction, the first appellant was sentenced to nine years imprisonment to commence after he has served his first sentence in respect of his conviction under the first trial.

[4] In the second appeal, the second appellant appealed against his conviction and sentence on two charges preferred against him. Both charges were under the Penal Code with the first charge for an offence punishable under s 109 read with s 377B while the second charge was for an offence punishable under s 377B. For his first conviction, the second appellant has been sentenced to six years imprisonment with two strokes of the rotan while for the second conviction, he has also been sentenced to six years imprisonment and two strokes of the rotan. The imprisonment terms are to run concurrently.

THE CHARGES

[5] The charge as amended preferred against the first appellant reads:

Bahawa kamu, pada satu malam di antara bulan Januari hingga Mac 1993, lebih kurang jam 7.45 malam, di Unit No 10–7–2, Tivoli Villa, Jalan Medang Tanduk, Bangsar dalam Wilayah Persekutuan Kuala Lumpur telah dengan sengaja melakukan persetubuhan bertentangan dengan aturan tabii dengan Azizan bin Abu Bakar dengan memasukkan zakar kamu ke dalam duburnya dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 377B Kanun Keseksaan (NMB Bab 45).

Translation:

That you, on one night between the months of January to March 1993, at or about 7.45 at Unit No 10–7–2, Tivoli Villa, Jalan Medang Tanduk, Bangsar, in the Federal Territory of Kuala Lumpur, did voluntarily commit carnal intercourse against the order of nature with Azizan bin Abu Bakar by introducing your penis into his anus, and you have thereby committed an offence punishable under s 377B of the Penal Code (FMS Cap 45).

[6] The charges as amended preferred against the second appellant read:

First charge:

Bahawa, pada satu malam di antara bulan Januari hingga Mac 1993, lebih kurang jam 7.45, di Unit No 10–7–2 Tivoli Villa, Jalan Medang Tanduk, Bangsar, dalam Wilayah Persekutuan Kuala Lumpur, Dato' Seri Anwar bin Ibrahim telah melakukan persetubuhan yang bertentangan dengan aturan tabii dengan Azizan bin Abu Bakar, di mana Dato' Seri Anwar bin Ibrahim tersebut telah memasukkan zakarnya di dalam dubur Azizan bin Abu Bakar dan kamu pada hari dan tempat yang sama, telah bersubahat melakukan kesalahan tersebut di mana kesalahan tersebut telah dilakukan hasil daripada persubahatan kamu, dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 109 dibaca bersama s 377B Kanun Keseksaan (NMB 45).

Translation:

That, on one night between the months of January to March 1993, at or about 7.45 at Unit No 10–7–2, Tivoli Villa, Jalan Medang Tanduk, Bangsar, in the Federal Territory of Kuala Lumpur Dato' Seri Anwar bin Ibrahim did commit carnal intercourse against the order of nature with Azizan bin Abu Bakar to witness the said Dato' Seri Anwar bin Ibrahim did introduce his penis into the anus of Azizan bin Abu Bakar dan that you on the same day at the same place did abet in the commission of the said offence where the said offence was committed in consequence of your abetment and you have thereby committed an offence punishable under s 109 read together with s 377B of the Penal Code (FMS Cap 45).

Second charge:

Bahawa kamu pada satu malam di antara bulan Januari hingga Mac 1993 lebih kurang jam 7.45, di Unit No 10–7–2, Tivoli Villa, Jalan Medang Tanduk, Bangsar dalam Wilayah Persekutuan Kuala Lumpur, telah dengan sengaja melakukan persetubuhan bertentangan dengan aturan tabii dengan Azizan bin Abu Bakar dengan memasukkan zakar kamu ke dalam dubur Azizan bin Abu Bakar tersebut dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 377B Kanun Keseksaan (NMB Bab 45).

Translation:

That you, on one night between the months of January to March 1993, at or about 7.45, at Unit No 10–7–2, Tivoli Villa, Jalan Medang Tanduk, Bangsar, in the Federal Territory of Kuala Lumpur, did voluntarily commit carnal intercourse against the order of nature with Azizan bin Abu Bakar by introducing your penis into the anus of the said Azizan bin Abu Bakar, and you have thereby committed an offence punishable under s 377B of the Penal Code (FMS Cap 45).

[7] The ingredients of the offences alleged in the charges preferred against the appellants have been correctly dealt with by the learned trial judge in his grounds of judgment. There was no dispute on that point.

[8] Thus, having heard the appeals as a whole we noted that the thrust of the complaint of both the appellants was on the learned trial judge's assessment of witnesses called, reception, appreciation and application of the evidence adduced by both the prosecution and the defence *vis-à-vis* the charges preferred against them.

[9] For convenience, we reproduce herewith the relevant sections under consideration.

[10] In respect of the sole charge preferred against the first appellant and the second charge preferred against the second appellant, the relevant sections in the Penal Code read:

377A Carnal intercourse against the order of nature

Any person who has sexual connection with another person by the introduction of the penis into the anus or mouth of the other person is said to commit carnal intercourse against the order of nature.

Explanation — Penetration is sufficient to constitute the sexual connection necessary to the offence described in this section.

377B Punishment for the committing carnal intercourse against the order of nature

Whoever voluntarily commits carnal intercourse against the order of nature shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping.

[11] As for the first charge preferred against the second appellant, the relevant sections in the Penal Code read:

107 Abetment of a thing

A person abets the doing of a thing who:

(a) instigates any person to do that thing;

(b) engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

(c) intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1 — A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

109 Punishment of abetment if the act abetted is committed in consequence, and where no express provision is made for its punishment

Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

Explanation — An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.

BRIEF BACKGROUND SUMMARY

[12] It is the version of the prosecution that one night between the months of January 1993 and March 1993, Azizan came to the apartment of the second appellant at Unit No 10–7–2, Tivoli Villa, Jalan Medang Tanduk, Bangsar, in the Federal Territory of Kuala Lumpur on the latter's invitation. On arrival, Azizan was surprised to find the first appellant there. Anyway, he was signalled by way of a hand gesture to go into a room where he was sodomized by the first appellant in the presence of the second appellant. Thereafter, the second appellant proceeded to sodomize him as well.

[13] After the incident, there was no immediate complaint lodged by Azizan with the police or other relevant authorities. However, by way of a statutory declaration made on 5 August 1997 ('P5') drafted by one Umi Halfida at his request, the said Azizan narrated the fact that he had been sodomized

by the first appellant in 1992. Copies of the same were given to certain personalities including the Prime Minister and a lawyer, Mr Karpal Singh. Initially, there was a flurry of police investigation carried out to record statements including that of Azizan. Nevertheless, for a while the issue appeared to subside. However, it resurfaced following the police report lodged by one Mohd Azmin bin Ali vide Dang Wangi Police Report No 144140/ 98. Azizan was then asked to give his statement to the police. He had given statements to the police earlier on in connection with another police report also related to allegation of sexual misconduct of the first appellant.

[14] The revival of the investigation resulted in a charge being preferred against the first appellant accusing him of having sodomized Azizan. But the month and year stated in the initial charge was May 1994 when the matter was first brought before the Sessions Court Kuala Lumpur on 29 September 1998. Subsequently, vide a certificate issued by the public prosecutor in the exercise of his power under s 418A(1) of the CPC the matter was transferred to the Kuala Lumpur High Court. And during the mention of the case on 27 April 1999, the prosecution applied to amend the charge in respect of the year only from 1994 to 1992. Typographical error was given as the reason.

[15] Meanwhile on 23 April 1999, the second appellant was charged for two offences, firstly for abetting the first appellant in May 1992 in the commission of the alleged offence for which the first appellant was charged and secondly for sodomizing Azizan during the same period. The matter first came before the Sessions Court Kuala Lumpur. Later on, it was transferred to the Kuala Lumpur High Court pursuant to a certificate issued by the public prosecutor under s 413A(1) of the CPC. The second appellant then served a notice of alibi dated 27 May 1999 on the public prosecutor in connection with the charges preferred against him wherein the alleged date of incident was 'May 1992'.

[16] A joint trial for both the matters commenced before the Kuala Lumpur High Court on 7 June 1999. At the commencement of the joint trial, the prosecution applied to amend the respective May 1992 charges of the appellants to the dates 'between the months of January to March 1993'.

[17] It is to be noted that after the first mention of the case against the first appellant on 10 October 1998, there were further mentions on 14 April 1999, 27 April 1999 and 4 May 1999. Pending the commencement of the trial proper, Azizan was also called by the investigation officer, Senior Assistant Commissioner-1 ('SAC1') Musa bin Hassan to give his further statement.

[18] Objections were made against the amendments to the respective charges but were overruled by the learned trial judge. In fact, there was an application made by the defence to have the charges struck out. That was also dismissed and an appeal against that decision is pending in the Court of Appeal. The objections and application took time for consideration by the learned trial judge, hence the first witness was called only when hearing resumed on 16 June 1999.

[19] It was also drawn to our attention during the hearing of these appeals that at the commencement of the hearing on 7 June 1999 in the court below, the lead counsel for the first appellant was YM Raja Aziz Addruse. Mr Karpal Singh was appearing for the second appellant.

THE TRIAL BEFORE THE HIGH COURT

[20] The trial before the learned judge in the court below took several weeks interspersed with adjournments. At the conclusion of the hearing and after deliberating on the evidence adduced, the learned trial judge came to several findings on facts and law to the issues raised, and ultimately held that the prosecution had proved its case against both the appellants beyond reasonable doubt and that the defence failed to raise any reasonable doubt on the prosecution's case.

[21] Some of the pertinent findings of the learned trial judge are as follows, inter alia:

(1) on the technical points:

(a) that there was no merit in the application to strike out the charges preferred against the appellants;

(b) that the reason advanced to disqualify him from hearing the case was frivolous and irrelevant; and

(c) that the notice of alibi given by the second appellant before the amendment to the May 1992 charges preferred against him remained valid and that there was no necessity for the second appellant to file a fresh notice under s 402A of the CPC. It is to be noted that contrary to what the learned trial judge had said but as contended by the learned public prosecutor before us which we agree, the first appellant never served a notice of alibi pursuant to s 402A of the CPC in connection with the charge preferred against him.

(2) on the merits:

(a) that the prosecution had proved its case against both the appellants on the following evidence adduced:

(i) the evidence of the principal witness, Azizan. The learned trial judge found this witness credible and that his testimony believable and remained unimpeached. In assessing the credibility of Azizan, the learned trial judge considered the several applications and submissions by the defence advanced to negate the evidence of Azizan. Such applications included the impeachment proceeding and for his recall after his conviction for khalwat; and

(ii) the admission of the confession of the second appellant as against him and his co-accused.

(b) that the defence failed to prove its defences of alibi, fabrication and conspiracy.

THE APPEALS

[22] Before us, the several grounds in the petitions of appeal were categorized and given different emphasis in submissions. But ultimately, we note that the main focal points in the appeals are the acceptance by the learned trial judge of Azizan as being a credible witness despite of the contradictory statements he made in the present case as well as in the first trial and the amendment of the May 1992 charges against the respective appellants. Having heard all the submissions, we are of the view that the grounds can be summarized in two broad categories, namely, on technical issues and on merits.

[23] The technical issues raised are as follows:

(i) that the trial was not according to law and thus infringed art 5 of the Federal Constitution in that:

(a) the learned trial judge should have disqualified himself from hearing the case on the ground of conflict of interest and likelihood of bias; and

(b) the learned trial judge disregarded the basic elements of the law on procedure and evidence in particular as regards the standard of proof at the close of the prosecution's case.

(ii) that the amendments to the May 1992 charges after the transfer to High Court pursuant to s 418A of the CPC was a nullity since the same should have been reverted to the lower court from where they originated before the amendment were made;

(iii) that with the amendments to the charges the trial was a nullity since no opportunity was given for notice of alibi to be served as required by law;

(iv) that the admission of alibi evidence without notice being given was a serious error in law as the learned trial judge had no discretion to admit such evidence;

(v) that the charges preferred against the appellants were vague and stale and the public prosecutor and his deputies acted in bad faith when preferring the charges against the appellants;

(vi) that there was a failure by the learned trial judge to appreciate the burden and standard of proof required of the prosecution and the defence respectively in order to succeed in their stands; and

(vi) that there was a failure by the learned trial judge to invoke s 114(g) of EA 1950 when it was appropriate to do so.

[24] On merits, the primary heads of complaints are:

(a) on the approach and analysis by the learned trial judge on the testimony of Azizan in respect of:

(i) his credibility as a witness;

(ii) the impeachment proceeding;

(iii) the law on corroboration vis-à-vis the evidence of Azizan; and

(iv) the law of accomplice and the confession of the second appellant.

(b) on the admission and truth of the confession of the second appellant and the reliance on the confession against the first appellant;

(c) the failure of the learned trial judge to properly consider and evaluate the evidence adduced to substantiate the defences of fabrication and conspiracy raised by the first appellant;

(d) the appreciation of the evidence on the alibi adduced by the appellants; and

(e) the lack of evidence against the second appellant in respect of the charge of abetment.

[25] The grievances on the sentences imposed will be dealt with later.

THE TECHNICAL ISSUES — CONTENTIONS AND FINDINGS

(i) Was the trial according to law?

(a) Disqualification of the trial judge

[26] Learned counsel for the first appellant contended that the learned trial judge should have disqualified himself from hearing the case in view of his past ownership of shares in Dataprep, a company in which one of the sons of the Prime Minister was also a shareholder. And this was added by the fact that the learned trial judge failed to disclose such fact voluntarily. According to learned counsel, there was a failure to meet the bias test as understood in law.

[27] In response, the learned public prosecutor argued that in his application to disqualify the learned trial judge the first appellant failed to show that there was a real danger of bias on the part of the learned trial judge in proceeding to hear the case. The cases of *R v Gough* [1993] 2 All ER 724 and *Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321 (FC) were cited.

[28] In his grounds of judgment, the learned trial judge ruled that the application was without logic since neither the Prime Minister's son nor the company was a party to the matter before him. And he went on to say this:

> The principle in *Pinochet*'s case does not apply.
>
> The real danger and reasonable apprehension and suspicion that I may be biased as alleged although it is not alleged, I am biased is a mere allegation by the counsel without any basis. It is raised for the purpose to embarrass me and for no apparent reasons and to delay this proceedings *(sic)*.

[29] We have considered this issue and we are of the view that there is no merit in it. We agree with the learned trial judge that such an issue should not arise in the first place since the matter before him did not involve the entity or personality that he had once associated with. Hence, the mere fact

that at one time he had shares in the company in which the son of the Prime Minister was also a shareholder could not be held to be a sufficient ground or circumstance to meet the test, namely, whether 'there was a real danger of bias on the part of the learned trial judge' (see *Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara* and *R v Gough*). We would go further and say that the allegation and the factual circumstance simply could not have 'caused a fair-minded and informed bystander to entertain a fear of real danger of bias' (see *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [2002] 4 MLJ 327; *Locabail (UK) Ltd v Bayfield Properties Ltd & Anor* [2000] 1 All ER 65).

[30] Indeed, other than the fact that the learned trial judge was a shareholder in the said company, there was nothing else shown by the first appellant that indeed the relationship of the shareholders in the company at the material time went beyond business interest. And that it is still continuing. It was also not shown that the Prime Minister's son had any interest in the matter that was before the learned trial judge as to allow a fair-minded and informed bystander to entertain a fear of a real danger of bias on the part of the learned trial judge.

[31] In our view, it is not for any reason or assertion that a judge should be disqualified from hearing a case. Indeed, a judge was even allowed to try a case involving a person he had contacts with previously (see *RC Pollard v Satya Gopal Mazumdar* AIR 1943 Cal 594). And this court had also expressed its abhorrence to the unhealthy trend of parties to disqualify judges for minor reasons. In *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors* [1995] 2 MLJ 213, this is what the court said (per Gopal Sri Ram JCA at p 220):

> I notice an unhealthy trend of late to allege bias too readily against a judicial arbiter on insufficient material. Nothing is capable of eroding public confidence in the judicial arm of the state than unwarranted and unfounded allegations of bias. It is therefore to be avoided at all costs, if necessary, by having resort to the power to punish for contempt.

(b) Observance of elements of procedure and evidence

[32] Next, the assertion on the failure by the learned trial judge to observe the basic elements of procedure and evidence when conducting the trial. We find this complaint devoid of any merit. It is too general and could only be dealt with specifically on the various grounds advanced by the appellants. We propose to do just that. At any rate, we find no fault in respect of the standard of proof adopted by the learned trial judge at the end of the prosecution's case. He said this in *PP v Dato' Seri Anwar bin Ibrahim & Anor* [2001] 3 MLJ 193 at p 247:

> ... the standard of proof required of the prosecution at the end of its case in the instant case before me is proof beyond a reasonable doubt on the charges against both accused as the alleged offences committed by the accused were between the month of January to March 1993.

(c) Section 418A and the amendments to the charges

[33] Briefly put, it was the contention of learned counsel for the first appellant that pursuant to the certificate issued under s 418A CPC it was the charges containing the allegations of wrongdoing in 1994 and/or May 1992 that were transferred to the High Court from the subordinate court. As such, the High Court should have declined the application to amend those charges. Otherwise, it would be an infringement of s 418A resulting in the subsequent trial illegal. Any amendment should entail the reverting of the matter to the subordinate court.

[34] In reply, the learned public prosecutor submitted that pursuant to the certificate issued under s 418A, what was transmitted to the High Court was the proceeding and not the charges.

[35] This issue was not directly addressed in the grounds of judgment of the learned trial judge. But in the earlier miscellaneous applications by the appellants to have the proceeding struck out due to the amendments to the charges preferred, the learned trial judge dismissed them on the ground that they were devoid of any merits. There is a pending appeal on that dismissal. Be that as it may, the issue lies before us for consideration.

[36] Section 418A reads:

> Trials by High Court on a certificate by the Public Prosecutor
>
> (1) Notwithstanding the provisions of section 417 and subject to section 418b, the Public Prosecutor may in any particular case triable by a criminal Court subordinate to the High Court issue a certificate specifying the High Court in which *the proceedings are to be instituted or transferred* and requiring that the accused person be caused to appear or be produced before such High Court.
>
> (2) The power of the Public Prosecutor under subsection (1) shall be exercised by him personally.
>
> (3) The certificate of the Public Prosecutor issued under subsection (1) shall be tendered to the Subordinate Court before which the case is triable whereupon the Court shall transfer the case to the High Court specified in the certificate and cause the accused person to appear or be brought before such Court as soon as may be practicable.
>
> (4) When the accused person appears or is brought before the High Court in accordance with subsection (3), the High Court shall fix a date for his trial which shall be held in accordance with the procedure under Chapter XX. (Emphasis added.)

[37] From our reading of the section, it is patently clear that it is the proceeding that is being transmitted when a certificate is issued and not the charge. That can be implied in the judgment of his Lordship Ahmad Fairuz FCJ (as he then was) in the case of *Abdul Ghani bin Ali @ Ahmad & Ors v PP* [2001] 3 MLJ 561 where at p 594, his Lordship said this:

> In s 418A of the CPC, a public prosecutor's certificate would effect a *transfer of a case pending* in a subordinate court to a High Court and thereafter the trial in the case shall be held in accordance with the procedure under Chapter XX of the CPC. (Emphasis added.)

[38] To agree therefore with the contention of learned counsel for the first appellant would mean to curtail the powers of the High Court in the further conduct of the trial, for instance, the power under s 158 of CPC which reads:

> Court may alter or add to charge
>
> (1) *Any Court* may alter or add to any charge at any time before judgment is pronounced.
>
> (2) Every such alteration or addition shall be read and explained to the accused. (Emphasis added.)

[39] There is also nothing to indicate in the foregoing section that it is subject to s 418A.

[40] In respect of the application by the prosecution to amend the charges preferred against the appellants the learned trial judge, in the exercise of his discretion, allowed it. He also ruled that there was no necessity for the prosecution to explain the reason for such amendments. However, in this case, explanation was given when the application was made.

[41] Hence, we find no error in the conclusion of the learned trial judge in allowing the amendments to the charges. It has been consistently held that it is for the public prosecutor to consider what charge to prefer against an accused person even upon an order of retrial. That question was posed and answered in the affirmative in the case of *Lee Weng Sang v Public Prosecutor* [1977] 1 MLJ 166. His Lordship Hashim Yeop Sani J (as he then was) said this at p 167:

> To sum up, an order of retrial would result in the trial to commence de novo and it is my opinion that even if the appellate judge had thought it fit to frame the charge or charges appropriate in his view for retrial that would not deprive the Public Prosecutor from exercising his own power under the Criminal Procedure Code to amend, alter, reduce or enhance the charges or even to offer no evidence in the proceedings.

[42] In any event, the amendments were only related to the time and period of the commission of the alleged offences by the respective appellants. And there are authoritative decisions of our courts wherein time and date in a charge were held to be immaterial. In *Hussin bin Sillit v Public Prosecutor* [1988] 2 MLJ 232, his Lordship Mohd Azmi SCJ at p 236 said this:

> It should be borne in mind that where the charge relates to only one offence, merely amending the date, place or time in the charge would not necessarily constitute amending the offence, and under section 156 of the Criminal Procedure Code, 'no error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded at any stage of the case as material unless the accused was in fact misled by such error or omission.' Thus, under illustration (d) of section 156, it is illustrated, '"A" is charged with the murder of John Smith on 6 June 1910. In fact the murdered person's name was James Smith and the date of the murder was 5 June 1910. "A"was never charged with any murder but one, and had heard the inquiry before the magistrate which referred exclusively to the case of James Smith. The court may infer from these facts that "A" was not misled, and that the error in the charge was immaterial.' Clearly, each situation must depend on the facts and circumstances of the particular case in determining whether any

amendment as to time, date or place affected before or in the course of the trial entails changing the offence with which the accused is charged into an entirely different offence. There is no reason to suppose that every amendment, either before or after commencement of the trial, must necessarily change the occasion in the original charge into an entirely different occasion so as to exclude evidence pertaining to it from being 'evidence in support of a defence of alibi'.

[43] And in *Law Kiat Lang v Public Prosecutor* [1966] 1 MLJ 215, his Lordship Thomson LP at p 216 made reference to an English case and said this:

> With regard to the first of these charges, the dates are wrong and the charge was at no time amended. This in itself, however, is without importance. As was observed by Atkin J in the case of *Severo Dossi* [1918] 13 Cr App R 158, 159:
>
> > From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence.

[44] Accordingly, we find no merit in the contention of learned counsel for the Appellants to the above mentioned issue.

(d) Amendment of the charges and the defence of alibi

[45] Firstly, Mr. Karpal Singh who, in these appeals appeared for the first appellant, submitted before us that upon amendments to the charges being allowed an application was made by the second appellant for an adjournment of the hearing for a period of 12 days to enable the service of notice of alibi in connection with the amended charges but was refused when hearing resumed on 16 June 1999. It was therefore submitted before us that there was deprivation to the appellants of their constitutional rights in that they could not rely on the defence of alibi for want of notice to be served as required by s 402A of CPC. Learned counsel therefore went on to say that as a result the trial was a nullity.

[46] Secondly, it was contended that notwithstanding the stand taken by the public prosecutor in not demanding for notice of alibi to be served and for not objecting to the admission of evidence pertaining to the defence of alibi, that should not detract from the fact that there was a serious breach of a mandatory statutory provision which entailed the trial a nullity. According to learned counsel the statutory provision could not be construed to endow the court or the prosecution with discretion on admission of alibi evidence without due compliance with the prerequisite of notice to be served.

[47] The learned public prosecutor in his response to the above arguments submitted that in respect of the first appellant the issue did not arise simply because he did not serve or file any notice of alibi. And neither was there an application by him or his then learned counsel for an adjournment of the hearing for the purpose of serving a notice of alibi on the amended charge. Thus, it was the contention of the learned public prosecutor that he would concede that the learned trial judge misdirected himself in allowing the admission of the alibi evidence tendered by the first appellant when no notice was served in compliance with s 402A of the CPC.

[48] Incidentally, it was also in the submission of the learned public prosecutor that although it was the stand of the defence that a notice of alibi was served by the first appellant in respect of the May 1992 charge, the prosecution never received it. Notwithstanding the denial of receipt, the issue was also left for the court to decide. With respect, we have already expressed our view on this point hereinabove and we need not reiterate it.

[49] Now, in particular reference to the contention advanced for the second appellant the learned trial judge ruled, inter alia:

(i) that he was of the view that the notice of alibi served earlier on the public prosecutor in relation to the May 1992 charge was still valid and remained effective despite the amendment to the charges at the commencement of the trial. And that it was not necessary for the second appellant to serve a fresh notice as in the circumstances the requirements of s 402A(1) of the CPC had been duly complied with and that the second appellant was entitled to adduce evidence in support of his alibi;

(ii) that in the circumstances of the case, he failed to see how the defence could be said to have been put in a disadvantage position with the amendment to the dates in the charges since the appellants were allowed to adduce evidence in support of their alibi;

(iii) that the purpose of giving notice of alibi is to *divert the mischief of the defence disclosing his defence of alibi at a late stage of the trial*;

(iv) that once *the defence of alibi is properly raised by the defence the prosecution has the discretion to investigate into the alibi if they feel like doing so*. However, investigation into the alibi would be entirely the discretion of the police under the direction of the public prosecutor;

(v) that whether to investigate or not, would be entirely for the public prosecutor to decide and within his prerogative. No one could force the public prosecutor to investigate as he should know what evidence he possessed to challenge the defence of alibi. And it would be *the prosecution's own funeral if as a result of non investigation the evidence adduced by the defence in support of the alibi is not challenged*.

(vi) that the court would decide on the success or failure of the defence of alibi based on the evidence before it.

[50] In order to appreciate the true intention of and the mischief addressed by s 402A of CPC, it is appropriate to reproduce it here. And it reads:

(1) Where in any criminal trial *the accused seeks* to put forward a defence of alibi, evidence in support of it *shall not be admitted* unless the accused shall have given notice in writing of it to the Public Prosecutor at least ten days before the commencement of the trial.

(2) The notice required by subsection (1) shall include particulars of the place where the accused claims to have been at the time of the commission of the offence with which he is charged, together with the names and addresses of any witnesses whom he intends to call for the purpose of establishing his alibi. (Emphasis added.)

[51] On plain reading of the section, it can be discerned that its only purpose is to prevent surprise to the prosecution in a criminal trial. That view was expressed by his Lordship Salleh Abas FJ (as he then was) in the case of *Krishnan & Anor v Public Prosecutor* [1981] 2 MLJ 121 when he said this at p 122:

> The object of the notice is merely to enable the prosecution to check upon the veracity of the alibi.

[52] And the beneficial aspects of that measure are to prevent unnecessary prosecution of a person who could clearly show that he was not at the scene of the crime, to allow the prosecution to prepare its rebuttal evidence on the alibi evidence and perhaps costs saving as adjournment would be avoided. If it is not made mandatory for an accused person to comply with the requirement then the primary purpose of that section would be defeated. In short, the section was enacted more for the convenience of the prosecution. To that extent, we are in agreement with the above reasoning of the learned trial judge.

[53] In respect of the first appellant, as noted earlier on, he did not serve any notice of alibi. Neither did he indicate that he would definitely want to serve a notice of alibi on the public prosecutor in connection with the amended charge preferred against him. As submitted by the learned public prosecutor, the then lead counsel of the first appellant only contended that a specific date should be given in the charge otherwise the first appellant might not be able to serve a notice of alibi. With respect, that is not the same as requesting for time to enable the service of a notice of alibi on the amended charge. Indeed no adjournment was asked for. And that could be explained by the fact that at that time the main objection was that the charge should not have been amended at all. Accordingly, in respect of the first appellant and as contended by the learned public prosecutor, we are inclined to think that since no notice of alibi was ever served and no request for time to serve one in respect of the amended charge there is therefore no merit in the contention advanced on his behalf on the issue. In respect of the reception of the evidence adduced by the first appellant despite the absence of the required notice and whether that should result in annulling the trial, we will deal with it later on in this judgment.

[54] On the other hand, the second appellant did ask for an adjournment. But it was the contention of the learned public prosecutor that his inability to serve a second notice of alibi did not prejudice him in anyway and at any rate his defence was not one of alibi. The case of *Vasan Singh v Public Prosecutor* [1988] 3 MLJ 412 was cited.

[55] Now, in addition to what we have said earlier on, we are inclined to agree that the second appellant suffered no prejudice since there was already the first notice of alibi served. Further, the second appellant was allowed to adduce evidence of his alibi pursuant to the first notice. Of course, whether or not such evidence was indeed evidence of alibi will be dealt with later on in this judgment.

[56] As regards the cases cited to us such as *Wong Kim Leng v Public Prosecutor* [1997] 2 MLJ 97, *Public Prosecutor v Lim Chen Len* [1981] 2 MLJ 41 and *Rangapula & Anor v Public Prosecutor* [1982] 1 MLJ 91, we have no doubt that they accurately stated the law on the prerequisites to adducing evidence of alibi. However, on the facts of the present case, these authorities are distinguishable. In respect of the second appellant, they are also not directly relevant in that there is no dispute that the second appellant served a notice of alibi albeit for the May 1992 charge.

[57] Accordingly, we do not think the approach taken by the learned trial judge on this issue of alibi and the notice thereof was entirely wrong particularly in respect of the second appellant as to warrant a ruling that the whole trial was a nullity. Perhaps we should remind ourselves of what his Lordship HT Ong CJ (Malaya) had to say on excessive legalism in the case of *Yap Chai Chai & Anor v Public Prosecutor* [1973] 1 MLJ 219 at p 221:

> What is always of paramount importance in the administration of criminal justice is a fair trial — not such excessive legalism as to give the ordinary meaning of words the sacrosanctity of a ritual.

[58] On the issue of the amendment to the charges in respect of the date alleged in the commission of the offences subsequent to the notice of alibi we need only to adopt the view expressed by the majority in the Supreme Court of Canada in the case of *Regina v P (MB)* 89 CCC (3d) 289; [1994] CCC LEXIS 2454; 113 DLR (4th) 461, where Lamer CJ opined thus (at p 297):

> *The fact that an accused may have an alibi for the period (or part of the period) described in the indictment does not automatically 'freeze' the dates specified in the indictment. That is to say, there is no vested right to a given alibi. Alibi evidence must respond to the case as presented by the Crown and not the other way around.* (Emphasis added.)

[59] Accordingly, we hold that the mere giving of the notice of alibi by the second appellant should not be construed as having the effect of limiting or 'freezing' the date or time specified in the charges preferred against them. As such, in our view, the hype on the three times changes to the dates in the charges was a result of a misapprehension of the true position of the law in respect of time factor when a charge is preferred against a person. Thus, in the instant case, we find no compelling ground to accept the contention of learned counsel for the first appellant on the forgoing issue.

Stale and vague charges

[60] Next is on the contention that the charges preferred against the appellants were stale, vague and done with bad faith.

[61] In respect of the first assertion, it was premised on the time lapse between the alleged commission of the offences and the arraignment of the accused. It was also contended that the charges were vague in term of time and other particulars.

[62] Now, on this issue of charge being vague we are not convinced that there is any merit in it. The learned trial judge came to his finding on the issue in this way:

> In this instant case, it is clear that in the charges it is specified the offences were alleged to have been committed one night at about 7.45pm between the months of January and March 1993 at Tivoli Villa, in the Federal Territory of Kuala Lumpur, I am of the view that these are particulars sufficient to clothe the charges with clarity and certainty. The charges as amended are clear and unambiguous and as such both the accused have not in any way misled by the charges as framed. Both the accused know what the charges are against them. They are not in any way prejudiced by the failure of the prosecution to state the exact date and this omission has not occasioned a miscarriage of justice. In any event a date in the charge has never been material. In *R v Severo Dossi* [1918] 13 Cr App R 158 (quoted in *Law Kiat Lang v PP* [1966] 1 MLJ 215 and *Ho Ming Siang v PP* [1966] 1 MLJ 252) Lord Atkin J observed:
>
> > From time in memorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence.

[63] With due respect, we find nothing gravely erroneous in the finding as to warrant an interference by this court.

[64] As regards the allegation of stale charges, it was also the submission of the learned public prosecutor that the allegation of stale charge should not arise since the investigation of the case only commenced in 1998 with the publication of the *Buku 50 Dalil* and the prosecution was launched in 1999. And it was also contended that in criminal law there is no time limitation.

[65] Having considered the facts and circumstances as adduced in evidence, we are inclined to agree with the learned public prosecutor. We would add that the assertions of stale charge and delay in the prosecution are of similar nature and hence our view on the effect of the alleged delay is therefore equally applicable.

[66] For the sake of completeness, we should briefly note the submissions of learned counsel on the issue of delay. It was submitted for the appellants that the time lapse between the alleged commission of the offences and the prosecution was too long. The delay according to learned counsel had prejudicial effect to the defence particularly in recalling events for the defence of alibi.

[67] In answer to that argument, learned public prosecutor submitted that it was for the defence to show that there was such delay that it amounted to an abuse of process and had caused undue prejudice and unfairness to the appellants.

[68] To begin, we would think that there should be no question of delay going by what the learned public prosecutor had submitted. The investigation began in 1998 and the prosecution was initiated in 1999. Further, we are inclined to agree that on such allegation it would be for the appellants to show prejudicial effect or effects. Indeed, it has been said that delay in the prosecution of a person for an offence such as sexual offence should not

necessarily be deemed to be prejudicial to an accused. 'It is a matter for the trial judge having heard the evidence to determine whether the memory of the complainants or of the respondent has dimmed with the passage of time and that the respondent is thereby deprived of a fair trial.' — per Goodridge CJN in the case of *Regina v WGG* 58 CCC (3d) 263; [1990] CCC LEXIS 3316 (Newfoundland Court of Appeal). In any event, for the first appellant, there should have been hardly any difficulty in accounting for his movements since it was not in dispute that being a member of the Cabinet and the Deputy Prime Minister at the material time his whereabouts at any time were recorded. And as for the second appellant, we would agree that the success or failure of his defence of alibi should hinge on the alibi of the first appellant.

Bad faith

[69] As for the second complaint, it was submitted that the learned deputies public prosecutor who conducted the prosecution of these cases were involved in the fabrication and extortion of evidence against the first appellant and thus tainted with bad faith in the conduct of their duties. And this contention was based on the evidence of Mr Manjeet Singh ('DW31') referring to his meeting with the then Attorney General, the present Attorney General and Dato' Azhar Mohamad. The case of *Smyth v Ushewokunza & Anor* [1997] SC (we were not given a complete citation of the case) — a decision of the Supreme Court of Zimbabwe, was cited in support this complaint. Learned counsel argued that the principle of fair hearing should be given due respect. Unfortunately, learned counsel for the appellants could only manage to secure a digest of the case. Hence, it is therefore quite difficult for us to consider if indeed this case is of any help. Anyway, even based on the digest copy it would appear that the facts of that case differed from the present case in that there it was stated that the prosecutor had personal cause or crusade against the accused. There was no allegation of that nature in the present case. Thus, we are very much in doubt if the principle in that case is of any relevance to the case before us.

[70] In reply to the foregoing complaint, the learned public prosecutor submitted that the evidence adduced did not tally with the allegation of fabrication or extortion for evidence and the learned trial judge was correct in finding that such evidence, for instance the statutory declaration of DW31, was irrelevant. It was alleged in the declaration that the evidence asked for was on womanizing habit of the first appellant and nothing to do with sodomy.

[71] Having carefully perused the evidence adduced and the contentions of the respective learned counsel and the learned public prosecutor, we have no hesitation to agree with the finding of the learned trial judge. We are also in agreement with the submission of the learned public prosecutor that the evidence relied upon to indicate fabrication or extortion on the part of the two learned deputies, Dato' Gani Patail and Dato' Azahar Mohamad, who prosecuted this case, did not support such assertion. The allegation was a demand by the learned deputies for evidence of womanizing habit of the first appellant whereas the charge preferred against him was for sodomy. If

indeed the learned deputies were anxiously gathering evidence against the first appellant then it would have been a futile exercise in what they were alleged to have done. Further, we are inclined to agree with the learned public prosecutor that it was DW31's own deduction and opinion when he said that he was asked to compel his client to give the required information.

[72] Thus, it is our considered opinion that the assertions and allegations, in particular of being tainted with bad faith, raised by learned counsel for the appellants have no basis.

(e) Section 114(g) of the EA 1950

[73] Learned counsel for the appellants argued that the learned trial judge failed to invoke s 114(g) of the EA 1950 against the prosecution when it was appropriate such as when the charges were re—amended and the failure to call certain persons as witnesses for the prosecution.

[74] Now, it should be borne in mind that adverse inference is not to be invoked liberally by the courts. Indeed, it is not in all cases of where there is an act complained of or a failure or omission to produce or adduce evidence that that section is relied upon. Only in cases where there has been an intentional suppression of material or crucial evidence that it may be invoked. Thus, in the case of *Public Prosecutor v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560, this is what his Lordship Chong Siew Fai CJ (Sabah and Sarawak) at p 579 had to say on the application of that section:

> Much had been canvassed before us respecting the drawing of adverse inference under s 114(g) of the Evidence Act 1950 from the non-calling of Cholar and Amran Whether or not such an inference should be drawn is not a matter of an inflexible rule but depends upon the circumstances of each particular case. In determining this issue, the question to consider is whether the existence of a fact or a state of things (ie, Cholar introducing PW9 and was present at the meetings; Amran staying in room 'K') makes the existence of another fact or state of things so likely that it may be presumed to exist. The answer must naturally vary according to the circumstances, the nature of the fact required to be proved and its importance in the controversy, the usual and commonly recognized mode of proving it, the nature, quality and cogency of the evidence which had not been produced and its accessibility to the party concerned.

[75] Thus, it depends on the facts and circumstances of each case. And it should also be remembered that the calling of witnesses in any prosecution is within the discretion of the public prosecutor. That was stated in the case of *Ti Chuee Hiang v PP* [1995] 2 MLJ 433 where Edgar Joseph Jr SCJ delivering the grounds of judgment of the court said this at p 438:

> We recognize that the function of the prosecution is to prosecute, and that does not mean that it must discharge the functions both of the prosecution and the defence.
>
> On the other hand, it is clear law that the prosecution must have in court all witnesses from whom statements have been taken, but they have a discretion whether to call them or not (see *Teh Lee Tong v Rex* [1956] MLJ 194). That discretion, however, must be exercised having regard in the interests of justice, which includes being fair to the accused (per Lord Parker CJ in *R v Oliva* [1965] 3 All ER 116 at p 122; [1965] 2 WLR 1028 at p 1035), and to call witnesses

essential to the unfolding of the narrative on which the prosecution case is based, whether the effect of their testimony is for or against the prosecution (per Lord Roche in the Ceylon Privy Council case of *Seneviratne v R* [1936] 3 All ER 36 at p 49, applied in *R v Nugent* [1977] 3 All ER 662; [1977] 1 WLR 789).

[76] In particular, to the complaint on the re-amendment of the charges, as discussed above, it is the prerogative of the prosecution to do so. As such we do not think it is appropriate to expect the learned trial judge to invoke s 114(g) in such instance. Hence, we find no basis to agree with the contention of learned counsel for the appellants.

[77] On the failure to call certain persons as witnesses it is to be noted that there is no dispute that these persons were offered to the defence at the end of the prosecution's case. Hence, there is no ground for the appellants to complain that they were not available. As to whether they were required in the 'unfolding of the narrative on which the prosecution is based', we are of the view that having considered the nature of the offences as per charges preferred and the witnesses called, in particular the victim, there was no necessity for the prosecution to call them as witnesses. Accordingly, we do not think the invocation of s 114(g) of EA should arise.

[78] Overall therefore, we are not persuaded that there is any merit in any of the points raised by learned counsel for the appellants under the technical issues identified hereinabove as to warrant allowing these appeals.

Issues on merits — The evidence

[79] As an opening remark, we say that it should be appreciated that the commission of an offence which is sexual in nature involves a minimum of two persons. And generally during commission there is no independent witness present 'like a fly on the wall observing the incriminating episode described' by a victim or complainant. Invariably therefore, the truth or falsity of such charge will depend on which version is to be accepted by the court. Credibility of the victim or complainant as a witness is therefore of paramount importance. And that explains the need for corroboration or at least a warning of the danger of convicting on uncorroborated evidence of such witness (see *PP v Mardai* [1950] MLJ 33; *Chiu Nang Hong v PP* [1965] 1 MLJ 40). As opined by the learned trial judge in the present case it is a charge that is easy to make but difficult to refute. In order to secure a conviction, the evidence must therefore be convincing particularly the evidence of the victim or complainant. Hence, it is not surprising in these appeals that the credibility of Azizan, one of the three persons in the alleged incident, became a crucial factor. And indeed the prosecution heavily relied on his testimony coupled by the retracted confession of the second appellant and such other corroborative evidence implicating the guilt of the appellants. On such evidence, the learned trial judge found beyond reasonable doubt the guilt of the appellants as charged. Thus, central to these appeals on the issues of merits are the grievances of the appellants as to the appreciation by the learned trial judge of the testimony of Azizan and his credibility as a witness, the admissibility, truth and trustworthy of the confession of the second appellant as against the maker and the first appellant and the probabilities of the defences of alibi, conspiracy and

fabrication raised by the appellants. Of course, his identification of corroborative evidence or the lack of it played an important supportive role.

The testimony of Azizan and his credibility as a witness

[80] In coming to his finding on the guilt of the appellants, the learned trial judge relied on the testimony of Azizan. Indeed, he was prepared to find conviction of the first appellant solely on the evidence of Azizan. It became therefore the main thrust of the complaint of the appellants in these appeals that the approach and appreciation by the learned trial judge of the testimony of the principal witness and the alleged victim of the offences allegedly committed by the appellants namely, Azizan, was highly unsatisfactorily in fact and in law. And for that it is perhaps appropriate to reproduce verbatim the opening remarks of Mr Fernando when he began his lengthy submissions thus:

> prosecution's case rests on evidence of PW6 — Azizan. Entire case turns on credibility of Azizan. Learned Judge found PW6 credible, reliable and honest. We say no. Most unreliable. Riddled with major inconsistencies and outright lies ... In previous trial before Augustine Paul J he gave evidence which he admitted during this trial that he was not sodomized by the Appellant. He said three times and that was why he continued visiting Appellant between 1992 and 1994. Otherwise he would have kept far away from him. PW6 admitted in most unequivocal term. Judge taken aback. Told the judge to record it. then Judge said he might have misunderstood. So I put again and his answer was clear and unequivocal. I asked the third time to be fair to him. His answer was unequivocal yes. Then after several days during re-examination a leading question was asked which I felt most unfair and ought to have been rejected. The leading question:
>
> > After 1992 were you sodomized again?
> >
> > Defence objected. Judge allowed. PW6 response was:
> >
> > Yes, I was sodomized but from September 1992 until today (1998) I was never sodomized.
>
> Witness continued:
>
> > One incident I will never forget is that I was sodomized by Appellants at Tivoli Villa.

[81] It was therefore obvious that what were highlighted by the learned counsel were the apparent inconsistent statements made by Azizan in the first trial as well as in the present case.

[82] It was also submitted by learned counsel for the appellants that undue weight was placed on the credibility of Azizan when none was due and instead he should have been impeached, that there was hardly any corroboration of his evidence and that he was an accomplice in the commission of the alleged offences.

[83] Accordingly, the issue of credibility of Azizan was therefore strenuously pursued. Every possible implication of what he told the learned trial judge was unfolded before us irrespective of the context in which it was said.

The basic summary of the complaints on the credibility of Azizan

[84] Learned counsel contended that the learned trial judge gravely erred in fact and in law in accepting the evidence of Azizan despite the following, namely:

(a) the inconsistencies in his evidence particularly on whether he was in fact sodomized by any of the appellants. References were made to the evidence of Azizan in the first trial, in particular to his statement when he said this:

selepas bulan September 1992 sehingga sekarang tertuduh tidak meliwat saya.;

[85] In the present case, Azizan told the learned trial judge that he was sodomized between the months of January and March 1993;

(b) for having given three versions of the alleged incident in that three dates were mentioned as indicated by the amendments to the charges;

(c) for not having given any statement to the police that he was sodomized yet the dates of 1992 and 1994 appeared in the initial charges and that the date of 1993 came about on the insistence of or at the behest of the police;

(d) for visiting the house of the first appellant even after the alleged incident while maintaining that he was scared of being left with him; and

(e) the disclosure by Azizan of bribery to him for his role in making the allegation against the first appellant.

[86] It was also contended that the learned trial judge erred in finding Azizan a credible witness of truth without appreciating the following, namely:

(i) for accepting the explanation of Azizan on the inconsistencies in his evidence and finding that Azizan had all to lose when in fact he benefited in that he was made a director and manager of a development company;

(ii) for making contradictory findings on the credibility of Azizan. In the course of the proceeding, the learned trial judge made a remark that Azizan was very evasive and contradictory in his answers yet in his grounds of judgment the learned trial judge found Azizan to be a highly credible and reliable witness;

(iii) for not taking immediate action against Azizan when he made obvious contradictory statements in court and to the police, that is, whether or not he was sodomized;

(iv) for accepting the explanation of Azizan as to why he continued to visit the house of the first appellant between 1992 and 1997;

(v) for having two versions in the impeachment proceeding, firstly, the learned trial judge agreed there were material contradictions in the statements of Azizan, hence for the impeachment proceeding. However, at the end of the proceeding, the learned trial judge ruled that there was no contradiction and even if there was it had been explained by Azizan;

(vi) for making an incomprehensible finding on the inconsistencies in the testimony of Azizan when it was clear that during the first trial Azizan made one statement and in the present case he made another contradictory statement, principally on the issue of whether he was sodomized after September 1992;

(vii) for not allowing the appellants to adduce evidence on the subsequent conviction of Azizan for khalwat. Such conviction would have gone into the issue of credibility of Azizan; and

(viii) for having mis-recorded the evidence during the impeachment proceeding which could have bolster the finding on credibility of Azizan as a witness.

The law

[87] Before we considered the various complaints of the appellants pertaining to the finding of the learned trial judge on the credibility of Azizan, we propose to have a quick review of the approach adopted by appellate courts in other common law jurisdictions in so far as it relates to credibility assessment of a witness by a trial judge. We need only to refer to a few judicial decisions of high authority.

[88] In *Clarke v Edinburgh Tramways* [1919] SC (HL) 35 at p 36, Lord Shaw of Dunfermline had this to say at p 36:

> When a judge hears and sees witnesses and makes a conclusion or inference with regard to what is the weight on balance of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observation with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the Judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a Court of Justice. In Courts of Justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate court? In my opinion, the duty of an appellate court in those circumstances is for each Judge of it to put to himself, as I now do in this case, the question, *Am I — who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case — in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.* (Emphasis added.)

[89] And in *Powell and wife v Streatham Manor Nursing Home* [1935] AC 243 at p 249, Viscount Sankey LC said this:

> What then should be the attitude of the Court of Appeal towards the judgment arrived at in the court below under such circumstances as the present? It is perfectly true that an appeal is by way of rehearing, but it must not be forgotten that the Court of Appeal does not rehear the witnesses. It only reads the evidence and rehears the counsel. Neither is it a reseeing court. There are different

meanings to be attached to the word 'rehearing'. For example, the rehearing at Quarter Sessions is a perfect rehearing because, although it may be the defendant who is appealing, the complainant starts again and has to make out his case and call his witnesses. The matter is rather different in the case of an appeal to the Court of Appeal. There the onus is upon the appellant to satisfy the court that his appeal should be allowed. There have been a very large number of cases in which the law on this subject has been canvassed and laid down. There is a difference between the manner in which the Court of Appeal deals with a judgment after a trial before a judge alone and a verdict after a trial before a judge and jury. *On an appeal against a judgment of a judge sitting alone, the Court of Appeal will not set aside the judgment unless the appellant satisfies the court that the judge was wrong and that his decision ought to have been the other way.* (emphasis added).

[90] And nearer home the same legal principles have been adopted both in criminal and civil cases. For instance, in the case of *Herchun Singh & Ors v Public Prosecutor* [1969] 2 MLJ 209 at p 211, his Lordship HT Ong CJ (Malaya) said:

> This view of the trial judge as to the credibility of the witness must be given proper weight and consideration. An appellate court should be slow in disturbing such finding of fact arrived at by the judge, who had the advantage of seeing and hearing the witness, unless there are substantial and compelling reasons for disagreeing with the finding: see *Sheo Swarup v King-Emperor* AIR 1934 PC 227.

[91] Again in *Lai Kim Hon & Ors v Public Prosecutor* [1981] 1 MLJ 84, his Lordship Abdul Hamid FJ (as he then was) expressed the law in this fashion at p 93:

> Viewed as a whole it seems clear that the finding of fact made by the trial judge turned solely on the credibility of the witnesses. The trial judge heard the testimony of each witness and had seen him. He also had the opportunity to observe the demeanour of the witnesses. Discrepancies will always be found in the evidence of a witness but what a judge has to determine is whether they are minor or material discrepancies. And which evidence is to be believed or disbelieved is again a matter to be determined by the trial judge based on the credibility of each witness. *In the final analysis it is for the trial judge to determine which part of the evidence of a witness he is to accept and which to reject. Viewed in that light we did not consider it proper for this court to substitute its findings for that of the learned trial judge.*
>
> *The principle of law governing appeals in criminal cases on questions of fact is well established, in that the Appeal Court will not interfere unless the balance of evidence is grossly against the conviction especially upon a finding of a specific fact involving the evaluation of the evidence of a witness founded on the credibility of such witness.* (Emphasis added.)

[92] And in *Kandasami v Mohamed Mustafa* [1983] 2 MLJ 85 (PC), Lord Brightman said this at p 88:

> There is the further problem, that the Federal Court's finding involved their acceptance of the defendant's evidence and their rejection of the plaintiff's evidence. The issue was one which depended entirely on an assessment by the judge of the credibility of the witnesses. The trial judge had found the defendant to be a most untruthful witness, while he accepted the plaintiff as a witness of truth. Their Lordships readily defer to the Federal Court's superior knowledge of local conditions and attitudes, and recognize their experience in evaluating the

evidence of witnesses drawn from different cultures. *But they feel it important to emphasize the pre-eminent weight which must be attributed to a trial judge's finding of fact based upon the credibility of witnesses whom he has seen and heard under examination and cross-examination, particularly in relation to a question of fact the answer to which is wholly dependent on the testimony of such witnesses.* Their Lordships respectfully draw attention to *Watt v Thomas* [1947] AC 484 and in particular to the speech of Lord Thankerton at pages 487 and 488. In their Lordships' opinion the Federal Court was not justified in rejecting the finding of the trial judge that the July Document was not intended by the plaintiff and the defendant to be binding upon them. (Emphasis added.)

[93] Another decision of high authority is the case of *Goh Leng Kwang v Teng Swee Lin & Ors* [1974] 2 MLJ 5, although a civil case from Singapore, we find the legal principle restated therein is equally applicable to the present case. A dispute before the court which entailed a determination on title to a piece of land the evidence turned on the oral testimonies of the opposing parties and their witnesses. The trial judge believed one version and rejected the other. On appeal to the Singapore Court of Appeal by the aggrieved party, the defendant, the appellate court ruled that 'for the defendant to succeed in this appeal, he has to convince us, as an appellate tribunal which has only the trial judge's notes of the evidence to work upon and has not seen or heard the witnesses, that the trial judge was wrong in his crucial findings of fact ... . We are quite unable to say that on all the evidence before him and having regard to his assessment of the witnesses and evaluation of their evidence that the trial judge's crucial findings of fact are wrong ... . In the final analysis, *it was for the trial judge to balance the probabilities and to evaluate the weight of the evidence on either side and it is not for this court to do so.* The trial judge has found the two principal witnesses of the plaintiffs were truthful witnesses and believed their evidence and he has rejected the defendant's evidence having found the defendant was not a witness of truth.' (Emphasis added.)

[94] Now, did the learned trial judge err in assessing the credibility of Azizan to such extent that this court should rightly interfere? To better understand the approach adopted we propose to examine in greater detail what were said by the learned trial judge. From the grounds of judgment, it is apparent that he has dealt with it primarily from various aspects, inter alia:

(i) from the angle of the impeachment proceeding;

(ii) on the submissions of learned counsel for the appellants that Azizan made not only inconsistent statements in the present case but during the first trial as well. And that his statements in the first trial were inconsistent with his statements in the present case;

(iii) on the alleged inconsistencies in Azizan's testimony and that of another witness;

(iv) corroborative evidence;

(v) the probability of Azizan being an accomplice; and

(vi) his conviction for khalwat.

The impeachment proceeding

[95] In respect of the impeachment proceeding and the credibility of Azizan, the learned trial judge said, inter alia:

It can be seen that he made two statements in the earlier trial:

(a) In examination in chief at p 242 of D6, he said:

Saya setuju bahawa Dato' Seri Anwar tidak meliwat saya sebab itulah saya masih pergi ke rumahnya antara tahun 1992 dan 1997. Jika tidak saya tentu menjauhkan diri dari rumahnya. ('the first statement')

(b) In re-examination at p 273 of D6 he said:

Selepas bulan sembilan 1992 sehingga sekarang tertuduh tidak meliwat saya. ('the second statement')

In his testimony from the witness box in the present trial Azizan said he was sodomized between the months of January and March 1993. I asked Azizan to explain the contradictions.

On examining D6 it appears to me there are material contradictions between the statements he made in the earlier trial and his evidence in the present trial.

...

... the question that has to be determined is whether what Azizan had said in the earlier trial firstly that he was not sodomized by Dato' Seri Anwar and that was why he continued to go to Dato' Seri Anwar's house between 1992 and 1997 and secondly that he was not sodomized after September 1992 was inconsistent with his evidence in the present trial when he said he was sodomized between the months of January and March 1993. If there is inconsistency then the evidence in this instant trial would be disregarded as unreliable. To determine whether there is such an inconsistency, it is necessary to look at Azizan's explanation. His explanation can be found in his testimony in his own words from the witness box which reads as follows:

Apabila saya katakan saya tidak diliwat selepas Mei 1992, di dalam perbicaraan dahulu saya maksudkan kejadian diliwat tidak berlaku di rumahnya. Itu adalah bagi menjawab soalan peguambela mengapa saya masih berkunjung ke rumah Dato' Seri Anwar. Kejadian liwat memang berlaku terhadap saya selepas Mei 1992 dan selepas saya berhenti kerja tetapi bukan berlaku di rumahnya. Saya juga ada memberitahu semasa perbicaraan dahulu kejadian tidak dapat saya lupakan berlaku di rumah Sukma di Tivoli Villa dan saya tidak ditanya tahun bila liwat itu berlaku. Apabila saya memberi keterangan di hadapan mahkamah ini itulah sebabnya saya beritahu liwat berlaku di dalam tahun 1993 di antara bulan Januari dan Mac 1993.

Azizan was cross-examined by Mr Fernando and for the purpose of the impeachment proceeding it is necessary to refer only to his testimony in connection with the incident of sodomy which took place in Sukma's apartment at Tivoli Villa as stated in his explanation. He agreed with the suggestion of the learned counsel that he was not sodomized by Dato' Seri Anwar and Sukma in May 1992 at Tivoli Villa. As regards the incident which took place at Sukma's apartment, Azizan was emphatic that he was sodomized at Tivoli Villa between the months of January and March 1993 as can be gathered from the following question and answer:

Question: Adakah awak beritahu polis awak diliwat di antara Januari hingga Mac 1993 di Tivoli Villa? **A**

Answer: Ya, ada.

It was contended by Mr Fernando that Azizan was not telling the truth, it was SAC-1 Musa, the investigation officer who forced Azizan to change the date from May 1992 to between January and March 1993. On this point Azizan was asked: **B**

Question: Jikalau awak cakap benar kenapa SAC-1 Musa suruh awak pinda tarikh itu dari Mei 1992 ke Januari hingga Mac 1993?

Answer: SAC-1 Musa suruh saya mengingatkan dengan jelas tentang saya diliwat oleh Dato' Seri Anwar dan Sukma di Tivoli Villa. **C**

Question: Ini bermakna jikalau SAC-1 Musa tidak suruh kamu pada 1 Jun 1999 pinda tarikh itu tentu kamu tidak akan buat apa-apa?

Answer: Tidak setuju. **D**

Question: Kamu setuju atas tindakan SAC-1 Musa memaksa kamu meminda tarikh itu daripada Mei 1992 ke Januari hingga Mac 1993 kerana Tivoli Villa tidak wujud pada bulan Mei 1992?

Answer: Tidak setuju. **E**

It is clear from the answers given by Azizan that he was not forced or asked by SAC-1 Musa to say that the incident took place between the months of January and March 1993. SAC-1 Musa only reminded Azizan to be sure of the incident of sodomy by both the accused at Tivoli Villa. In his evidence, Azizan was emphatic that he was sodomized at Tivoli Villa between January and March 1993. I find that it was Azizan who told SAC-1 Musa about the incident at Tivoli Villa and not SAC-1 Musa who forced him to say that he was sodomized. **F**

...

... both the statements he made in the earlier trial were in answer to questions which are inter-connected in the sense that they relate to Azizan's visit to Dato' Seri Anwar's house between 1992 and 1997. The first statement was made in answer to the question put to the witness in cross examination namely 'I put it to you, you were not sodomized by Dato' Seri Anwar Ibrahim and that is why you continued to visit him in his house between 1992 and 1997 otherwise you would have kept far away'. **G**

The second statement was in answer to the question in re-examination: **H**

Adakah peristiwa liwat terhadap kamu oleh tertuduh masih berlaku selepas bulan sembilan 1992?

...

To my mind the two statements are the same in the sense that they are related to the same incident namely Azizan was sodomized after September 1992. Azizan in his explanation said what he meant when he said in the earlier trial that he was not sodomized after May 1992 was that he was not sodomized in Dato' Seri Anwar's house when he was asked 'mengapa saya masih berkunjung ke rumah **I**

Dato' Seri Anwar'. He further said without any reservation in his explanation that kejadian liwat memang berlaku terhadap saya selepas Mei 1992 dan selepas saya berhenti kerja tetapi bukan di rumahnya'.

It is to be noted that it is in evidence that Azizan stopped work as a driver to Datin Seri Dr Wan Azizah at the end of September 1992. It is therefore crystal clear that his explanation covers the second statement as well. Under these circumstances, it is futile for the defence counsel to maintain that Azizan has not explained the second statement he made in the earlier trial. It can be gathered clearly from his explanation he was sodomized after September 1992 but not in Dato' Seri Anwar's house but elsewhere. Azizan is very consistent with his story that he was not sodomized in the house but elsewhere after September 1992. He said this in the earlier trial where he said:

> Salah satu perbuatan yang tidak dapat saya lupakan ialah peristiwa di rumah Sukma di Tivoli Villa di mana tertuduh telah meliwat saya dahulu dan diikuti dengan adik angkatnya meliwat saya.

He also gave similar evidence to this effect in his testimony before this court with the addition that he was sodomized at Tivoli Villa between the months of January and March 1993.

On a close scrutiny of the explanation by Azizan, I find no difficulty in accepting it under the circumstances and on the evidence available. The explanation is logical and not inherently incredible bearing in mind the questions that were posed to him. The statements in question which form the basis of the impeachment of Azizan must be read in the context of the questions that were asked. I find that there is in fact no contradiction at all between what he had said in the previous trial and the evidence he gave in this instant proceedings in respect of the act of sodomy as stated in the charges against both accused. In any event, even assuming that there is a material contradiction I am more than satisfied that Azizan has successfully explained the contradiction for reasons stated above beyond any doubt. I, therefore, ruled that the impeachment proceeding failed and the credit of Azizan was saved and remained intact and further that in truth, in fact and in substance Azizan was a truthful witness.

[96] With respect, we find nothing wrong in the conclusion of the learned trial judge for not impeaching the credit of Azizan. He accepted his explanation for the seemingly contradictory statements which gave the apparent impression that they were contrary to his allegation against the appellants. Indeed in such proceedings it is the trial judge who has the advantage of listening and seeing the demeanour of the witness giving his explanation for his inconsistent statements. Hence his acceptance of the explanation should be given significant consideration. In *Ooi Choon Lye v Lim Boon Kheng & Ors* [1972] 1 MLJ 153, it was observed that as the learned trial judge 'based his decision on the opinion he formed as to the comparative reliability of witnesses, it was not open to the Federal Court, as an appellate court, to interfere with that decision'. In the present case, we have no reason to depart from that observation.

[97] It was also contended that the learned trial judge made two inconsistent findings in the impeachment proceeding, in that on one hand, he found contradictions in the statements of Azizan, and on the other, he found none.

[98] With respect, such submission omitted the fact that it was essential for the learned trial judge to note the contradictions before he could allow the impeachment proceeding. Indeed, the very purpose of an impeachment proceeding is to enable a witness to explain any material contradiction in his testimony presently given or in relation to his previous statement on the same issue. And it is up to the learned trial judge having heard the explanation to assess his credit 'as a whole with the rest of the evidence at the appropriate stage, that is to say, at the close of the case for the prosecution or for the defence as the case may be. No immediate order of a summary nature can or should be made ... and the right of cross examination or re-examination according to the circumstances should not be denied as it might well be that in the exercise of such right his credit might be repaired, restored or re-establish' — per Eusoff Abdoolcader FJ in *Dato' Mokhtar Hashim v PP* [1983] 2 MLJ 232. Accordingly, we find no merit in such submission.

The inconsistent statements of Azizan

[99] It was the contention of learned counsel for the appellants that Azizan should not be accepted as a reliable witness since he made inconsistent statements. References were made to his evidence as recorded in the notes of evidence of the first trial and his evidence in the present case.

[100] In addressing the issue the learned trial judge, inter alia, relied on his findings in the impeachment proceeding wherein he concluded that by his refusal to impeach Azizan his credit was therefore saved. And in respect of the change in the date of the alleged incident the learned trial judge came to a finding thus, inter alia:

> ... It can be gathered from his explanation that what he meant by saying that it was SAC-1 Musa who asked him to change the date was that SAC-1 Musa asked him to remember the date clearly with regard to the incident that took place at Tivoli Villa for the first time.

[101] It was found by the learned trial judge that the evidence of SAC1 Musa corroborated the explanation of Azizan on the issue, hence, there was no question of Azizan making an inconsistent statement. In making his finding, the learned trial judge said this:

> This evidence corroborates what Azizan had said that it was he who told SAC-1 Musa of the date, ie between January and March 1993 as stated in the charges against both the accused. I accept the evidence of SAC-1 Musa on this issue as I find there is no reason why he should ask Azizan to change the date. He was only carrying out his duties as an Investigation Officer. He felt that there is a likelihood the date stated in the charge may not be accurate after carrying out further investigations on receipt of the notice of alibi. It is clear on the evidence adduced and under the circumstances of the case Azizan was not asked by SAC-1 Musa to change the date. I am convinced that it was Azizan who told SAC-1 Musa that he was sodomized by both the accused between January and March 1993 at Tivoli Villa. I find as a fact that Azizan was telling the truth.

[102] It was also submitted that while under cross-examination Azizan gave inconsistent answers. However the learned trial judge came to his findings thus:

A close scrutiny of the evidence would reveal that he was asked repeatedly in cross examination whether he told the police he was sodomized in May 1994 and May 1992.

...

It is to be observed that May 1994 and May 1992 are not the months we are concerned with in the instant charges against both the accused. These months are relevant only in respect of the earlier charges which have been amended. We are not concerned with these charges.

...

In his testimony Azizan said he was confused because he was asked about the months of May 1994 and May 1992 repeatedly as stated above. *I find as a fact that he was confused.* When a witness is confused, it does not mean he was lying. The naked truth is that he could not remember what he had said. I am satisfied he was not lying. In any event, the issue whether he told the police he was sodomized in May 1994 and May 1992 are not the issues in the current charges against both the accused. The issue is whether he was sodomized by both the accused between the months of January and March 1993 at Tivoli Villa. I therefore rule the credit of Azizan is not affected on this score. (Emphasis added.)

[103] Next dealt with but still on the issue of inconsistent statements and the credibility of Azizan was in reference to his statements to the police and the evidence of the Investigation Officer, SAC1 Musa, on the allegation of sodomy. Having considered the evidence, the learned trial judge came to this finding:

Be that as it may, the evidence of SAC-1 Musa clearly states that Azizan was consistent in his statements on the issue of sodomy although he was not sure of the exact dates. The relevant dates we are concerned with in the present charges are between the months of January and March 1993. Azizan emphatically said in evidence that he was sodomized by both Dato' Seri Anwar and Sukma at Tivoli Villa between these dates and he gave the reasons for remembering the dates. This evidence was not successfully challenged. It is therefore established on this evidence that Azizan was sodomized by both Dato' Seri Anwar and Sukma in Tivoli Villa between January to March 1993. Whether he was sodomized in May 1994 or May 1992 is not relevant as these dates are not in issue to be decided in this case.

[104] We find the analysis by the learned trial judge on the inconsistent statements comprehensive and well reasoned. It was also partly based on his finding of the factual situation when Azizan gave his evidence. As to the discrepancies on the details, we need only to note what was said by his Lordship Abdul Hamid J (as he then was) in *Chean Siong Guat v PP* [1969] 2 MLJ 63 at p 64:

Absolute truth is, I think beyond human perception and conflicting versions of an incident, even by honest and disinterested witnesses, is a common occurrence. In weighing the testimony of witnesses, human fallibility in observation, retention and recollection are often recognized by the court.

[105] And in the case of *Khoon Chye Hin v Public Prosecutor* [1961] MLJ 105 it was held that '... If a witness demonstrably tells lies on one or two points then it is clear that he is not a reliable witness and as a matter of

prudence the rest of his evidence must be scrutinised with great care and indeed with suspicion. To say, however, that because a witness has been proved a liar on one or two points then the whole of his evidence "must in law be rejected" is to go too far and is wrong.' per Thomson CJ at p 107.

[106] Surely therefore, it would be wrong in law to wholesale reject the evidence of Azizan just because he faltered in few instances in the course of his testimony. Indeed discrepancies found in the testimony of a witness may be evidence of his truthfulness rather than the reverse (see also *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor.*

[107] It should also be noted that those apparent inconsistent statements of Azizan during the first trial became the reason for the commencement of the impeachment proceeding. But with the conclusion arrived at by the learned trial judge in respect of the impeachment proceeding, any subsequent reliance on those very statements as positive evidence for the trial proper should be disallowed (see *Public Prosecutor v Lo Ah Eng* [1965] 1 MLJ 241; *Public Prosecutor v Wong Yee Sen & Ors* [1990] 1 MLJ 187). There are also limits to the use of evidence adduced in a previous trial (see *Sambasivam v The Public Prosecutor, Federation of Malaya* [1950] MLJ 145; *Thavanathan a/l Balasubramaniam v Public Prosecutor* [1997] 2 MLJ 401). And there was no assertion from learned counsel for the appellants that reliance was placed on the previous statements of Azizan for their truth. Basically, it was only referred to in an attempt to undermine the credibility of Azizan as a witness. And such record of the previous inconsistent statement is only admissible if the witness denies making that inconsistent statement. The mere fact that the record contains the inconsistencies does not make it admissible wholesale. More so in the present case, the admission of D6 was not for the purpose of making those transcripts positive evidence for the trial.

On corroboration

[108] As regards the testimony of Azizan and the law of corroboration, it was the contention of learned counsel for the appellants that being an unreliable witness there should be no question of corroboration of the evidence of Azizan. The case of *TN Nathan v Public Prosecutor* [1978] 1 MLJ 134 was cited in support. Alternatively, it was submitted that in view of the nature of the offences as per charges the law demands that the evidence of Azizan must be corroborated. And in this case, there was no corroborative evidence contrary to the finding of the learned trial judge.

[109] Now, in his grounds of judgment the learned trial judge restated the law thus:

> It is therefore trite law that a complainant's evidence in a sexual offence requires corroboration although a conviction founded on the uncorroborated evidence of the complainant is not illegal provided that the presiding judge must warn himself of the danger of convicting on such uncorroborated evidence (see *Chiu Nang Hong v PP* [1965] 1 MLJ 40).

[110] We have no doubt on the correctness of the restatement of the law. What therefore is the position of Azizan in this context? Was the overall

finding of the learned trial judge of him being a truthful and reliable witness justified? For if Azizan was not a reliable and truthful witness then there should be no issue of corroboration of his evidence.

Azizan a reliable and truthful witness?

[111] We have dealt with this issue earlier on in this judgment in response to the criticism on the credibility of Azizan advanced by learned counsel for the appellants. Put shortly, it was the finding of the learned trial judge that Azizan was a reliable, credible and truthful witness notwithstanding some of the discrepancies and contradictions that were highlighted by the defence.

[112] Bearing therefore in the forefront of our minds such finding, we therefore ask ourselves: Can we — 'who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case — in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong?'

[113] We have given our anxious consideration to the complaints of the appellants, whether or not specifically dealt with herein, on the findings of the learned trial judge in relation to his assessment on the credibility of Azizan but we are unable to say that the learned trial judge was plainly wrong in coming to his findings as he did. In fact, we find that the learned trial judge went quite far to ensure that Azizan was duly scrutinized as a witness. He allowed an impeachment proceeding to be conducted so that all parties could be heard on the apparent discrepancies in the statements and testimonies of Azizan. If indeed he was inclined from the start to favour Azizan as a witness then it would have been convenient for him just to rule that the discrepancies as found were minor and required no further proceeding. He did not, but instead went into detail examination of the evidence given by Azizan in order to arrived at a proper conclusion. Plainly therefore being an appellate court, we should be slow in substituting our own assessment of Azizan as a witness (see *Periasamy s/o Sinnappan & Anor v PP* [1996] 2 MLJ 557 (CA)). As such, that finding should be accepted as the correct assessment of Azizan. After all, on the issue of whether to accept or reject the evidence of a witness, the 'real tests are how consistent the story is with itself, how it stands the test of cross-examination and how far it fits in with the rest of the evidence and the circumstances of the case' per Lord Roche in *Bhojraj v Sita Ram* AIR 1936 PC 60 at p 62 (see also *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor*).

[114] Thus, as we agree with the learned trial judge that in view of his finding of Azizan being a truthful and reliable witness the legal principle as restated in *TN Nathan v Public Prosecutor* has no application.

[115] There was a complaint by the appellants that the learned trial judge could not have found Azizan a truthful and credible witness in view of his remark of him being 'evasive and appears to me not to answer simple question put to him' during the hearing.

[116] From the notes of proceeding, there is no denial that such remark was made. However, the question is in what context and whether the learned

trial judge was bound by it even with the advantage of considering the testimony of Azizan as a whole.

[117] If the contention of learned counsel for the appellants were to be acceded then that would run contrary to an established legal principle expounded in a civil case of *Yuill v Yuill* [1945] 1 All ER 183 and ruled as equally applicable in criminal cases by a local case of *Tara Singh & Ors v Public Prosecutor* [1949] MLJ 88 in that 'an impression as to the demeanour of a witness ought not to be adopted by a trial judge without testing it against the whole of the evidence of the witness in question' (see also: *Ku Lip See v Public Prosecutor* [1982] 1 MLJ 194).

[118] Accordingly, the complaint is inconsequential in so far as it relates to the finding by the learned trial judge on the credibility of Azizan.

The corroborative evidence

[119] The next issue is whether the learned trial judge was correct in his finding of corroborative evidence adduced. He found the following as corroborative evidence to the testimony of Azizan:

(i) The conduct of first appellant in 'asking Azizan to deny his 'Pengakuan Bersumpah' ('P5') which was sent to the Prime Minister, and secondly, by asking SAC1 Musa, the investigation officer to close the investigation related to the police report lodged by his aide DSP Zull Aznam. The report was lodged after an anonymous letter entitled *Talqin Kutuk Anwar Ibrahim* surfaced wherein it made allegations of sexual misconduct on the part of the first appellant. It was the evidence of SAC1 Musa as summarized by the learned trial judge that 'his findings that the allegations against Dato' Seri Anwar contained therein were not totally unfounded. The allegations were not fully and completely investigated despite the existence of ample evidence that warranted a full investigation because Dato' Seri Anwar requested him to stop investigation'. The learned trial judge went on to say this:

> This is evidence which is relevant to help the court to come to a finding of fact whether there was indeed fabrication of evidence in respect of sodomy alleged to be committed by Dato' Seri Anwar Ibrahim. It is startling to note that the defence did not touch on this aspect of the evidence. Be that as it may, in my opinion, this evidence of conduct of Dato' Seri Anwar is a circumstance telling against him which he has to explain. This evidence is relevant where it would lend support to show that the accused is guilty (see *Chandrasekaran & Ors v PP* [1971] 1 MLJ 153).

(ii) The confession of Sukma ('P4'). It was the conclusion of the learned trial judge that the confession of the second appellant was made voluntarily, hence admissible. Further, it was his finding that 'the relevant part of the confession which is in respect of the commission of sodomy by both Dato' Seri Anwar and Sukma on Azizan is true and reliable'. And he held that 'the confession (P4) sufficiently supports and corroborates Azizan's evidence'.

The law on corroborative evidence

[120] The nature of corroborative evidence is a subject which has been exhaustively discussed in major cases by the apex courts in several jurisdictions. And the learned trial judge in the present case rightly referred to some of them when he said this:

> The word corroboration had no special technical meaning; by itself it meant no more than evidence tending to confirm other evidence (see *Director of Public Prosecutions v Kilbourne* [1973] 1 All ER 440). It has also been said that what is required is some additional evidence rendering it probable that the story of the complainant is true and that it is reasonably safe for the court to act upon the evidence. In the celebrated case of *R v Baskerville* [1916] 2 KB 658 at p 667 Viscount Reading LCJ said:
>
> We hold that the evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.
>
> It has also been held that corroborative evidence is not necessarily restricted to the oral evidence of an independent witness. Corroboration can equally be well afforded by established facts and the logic of established facts sometimes speaks even more eloquently than words (see *Brabakaran v PP* [1966] 1 MLJ 64.

[121] Further, corroboration 'may be found in independent evidence or in admissions of the prisoner, or in inferences properly drawn from his conduct and statements. And it is, in our opinion, for the jury in the present case to say what complexion the conduct and statements of the prisoner bear' (see *Eade v The King* [1924] 34 CLR 154, at p 158). In other words, whether or not the conduct and statement of an accused person has the effect of being corroborative evidence is for the trial court to consider.

The statutory declaration ('P5') of Azizan and the conduct of first appellant in asking him to retract it and for SAC1 Musa to stop investigation: Corroborative evidence?

[122] It is to be noted that the learned trial judge found that the act of the first appellant in asking Azizan to deny the content of P5 was corroborative evidence in nature and that it was relevant by virtue of s 8 of EA 1950. With respect we are inclined to agree with his finding. There was no challenge from either of the appellants to the prosecution's assertion that the first appellant had asked Azizan to deny the content of P5.

[123] Similarly, it was also found by the learned trial judge as relevant under s 8 of EA 1950 as well as being corroborative evidence the action of first appellant in instructing SAC1 Musa to cease investigation in connection with the police report No 2706/96 lodged earlier on by ASP Aznam. We agree with his conclusion. Surely, it should be reasonable for the learned trial judge having heard the evidence to make an inference from such unchallenged facts that such conduct had an ulterior motive and done for the benefit of the first appellant and thus categorizing the same as 'evidence tending to confirm other evidence' although such evidence could not be said to be directly in relation to the offence as per charge.

Confession of second appellant: Corroborative evidence?

[124] And as for the confession of Sukma (P4) we also agree with the learned trial judge that after finding the confession as having being made voluntarily and admitted in evidence the same should have corroborative effective on the evidence of Azizan. But it was also submitted that once retracted as in the present case such confession could no longer corroborate.

[125] With respect, we are of the view that such approach is not in consonant with the accepted legal principle. In the case of *Tinit & Ors v Public Prosecutor (No 2)* [1964] MLJ 389, McGilligan J was of the opinion that retracted confessions 'once found to have been voluntarily made — were very good corroboration'. That in our view makes sense for it is settled law that a confession on its own, even if subsequently retracted so long as the court is satisfied of its voluntariness and truth, can be a basis to convict an accused person (see *Osman & Anor v Public Prosecutor* [1967] 1 MLJ 137 (FC); [1968] 2 MLJ 137 (PC); *Yap Sow Keong & Anor v Public Prosecutor* [1947] MLJ 90; *Dato' Mokhtar bin Hashim v PP*. There is therefore is no reason why it cannot be good corroborative evidence.

[126] Accordingly in the present case, the finding of the learned trial judge as to the corroborative effect of the confession of the second appellant to the evidence of Azizan is justified. Hence, we are therefore unable to accept the submission of learned counsel for the appellants that the confession having been retracted should not have been taken as corroborative evidence.

Evidence of PW2 — Dr Mohd Fadzil and PW3 — Tun Hanif Omar

[127] The prosecution also submitted as corroborative evidence the evidence of Dr Mohd Fadzil — PW2. However, the learned trial judge held that his evidence could not corroborate the evidence of Azizan as it 'does not confirm the story of Azizan that he was sodomized by both the accused'. From that perspective that may be correct. However, we are of the view that in so far as it relates to the confession of the second appellant (P4), it is definitely relevant. Thus on that score, we differ with the learned trial judge. Otherwise, we agree with his reasoning pertaining to the admissibility of the testimony of PW2 on other issues.

[128] As for the testimony of Tun Hanif Omar — PW3, it was ruled by the learned trial judge as hearsay his evidence on the issue of unusual sex activities involving the first appellant with three named persons based on a Special Branch investigation. The learned trial judge reasoned that none of the officers involved in the investigation or the alleged three persons who allegedly had sexual activities with the first appellant was called to testify. On that basis, we are inclined to agree with him.

[129] However, the fact that Tun Hanif did speak to the first appellant and the response he received should be admitted as relevant. There was no dispute to the assertion of Tun Hanif that the first appellant did not protest when he was told to stop his wayward activity. Surely, one would have registered his disapproval to the assertion instead of just asking whether he would be subject to blackmail by the police. In *R v Chandler* [1976] 1 WLR 585 (CA),

Lawton LJ in the course of his judgment said this at p 589:

> The law has long accepted that an accused person is not bound to incriminate himself; but it does not follow that a failure to answer an accusation or question when an answer could reasonably be expected may not provide some evidence in support of an accusation. Whether it does will depend upon the circumstances.

[130] (See also *Reg v Mitchell* (1892) 17 Cox CC 503, 508; *R v Cramp* (1880) 14 Cox CC 390; *Bessela v Stern* (1877) 2 CPD 265).

Azizan an accomplice?

[131] It was also the contention of learned counsel for the appellants that Azizan was an accomplice and hence his evidence would require corroboration or at least a warning by the learned trial judge of the danger of convicting based on uncorroborated evidence of an accomplice. It was also reiterated that the charges, of sexual offences in nature, corroboration or at least a warning of the danger to convict on uncorroborated evidence would be prudent.

[132] We have carefully reviewed the grounds of judgment of the learned trial judge on these points and we find no reason to differ from his conclusions. The learned trial judge held that Azizan was not an accomplice in these words:

> The case laid down the principle that when an accomplice acts under a form of pressure which it would require some firmness to resist reliance can be placed on his uncorroborated evidence.
>
> In the instant case, the evidence shows that Azizan was invited to visit Tivoli Villa by Sukma. Azizan went there to see Sukma's new apartment. He went there not with the intention of committing sodomy with both the accused. His actus reus alone is not sufficient to make him an accomplice, there must also be the intention on his part (see *Ng Kok Lian*'s case). For the reasons, I therefore find that Azizan is not an accomplice.

[133] In any event, overall, the learned trial judge did warn himself of the danger of convicting an accused person in sexual cases on uncorroborated evidence. In our view, such a direction should suffice for the purpose of the present case.

The conviction of Azizan for khalwat

[134] The conviction of Azizan for the offence of khalwat before the Syariah Court in Alor Gajah Melaka was also brought up by learned counsel for the appellants with the view to undermine his credibility as a witness. The learned trial judge held that:

> What transpired in the Syariah Court would not be relevant in assessing the credibility of Azizan. It has been held that a conviction of a witness for an offence is not a ground for disbelieving a witness (see *Gipp v R* [1998] 155 ALR 15 — High Court of Australia). It follows therefore the mere fact that Azizan was convicted in the Syariah Court under the Syariah law is no ground for discrediting his evidence given in the instant trial and to disbelieve him.

[135] With respect, we are inclined to agree with the conclusion arrived thereat on the issue. **A**

Question on re-examination of Azizan and allegation of misrecording

[136] As regards the issue of re-examination, learned counsel for the first appellant was relating more to the event in the first trial which was the cause for the impeachment proceeding during the hearing of the present case. In short, it was the submission of learned counsel that due to what transpired in the first trial the answer of Azizan after the re-examination thereof should not be believed as he was then only parroting the words of the then learned deputy public prosecutor. **B** **C**

[137] For clarity, it is perhaps appropriate here to briefly refer to that portion of the evidence of Azizan during his cross-examination in the first trial, inter alia:

> ... Saya setuju bahawa Dato' Seri Anwar tidak meliwat saya sebab itulah saya masih pergi ke rumahnya antara tahun 1992 dan 1997. Jika tidak saya tentu menjauhkan diri saya dari rumahnya. **D**

[138] In re-examination, Azizan was asked to explain what he meant by that answer. And he said this, inter alia:

> Selepas bulan sembilan 1992 sehingga sekarang tertuduh tidak meliwat saya ... Salah satu perbuatan yang tidak dapat saya lupakan ialah peristiwa di rumah Sukma di Tivoli Villa di mana tertuduh telah meliwat saya dahulu dan diikuti dengan adik angkatnya meliwat saya. **E**

[139] It was the last part of the answer that was strenuously objected to by learned counsel for the appellants contending that that was not part of the cross-examination. And it became one of the foundations for the impeachment proceeding in the present case. Hence, Azizan was therefore asked to explain the contradiction. **F**

[140] The explanation given was, inter alia:

> Kejadian liwat memang berlaku terhadap saya selepas bulan Mei 1992 dan selepas saya berhenti kerja tetapi bukan berlaku di rumahnya. **G**

[141] It was the argument of learned counsel for the appellants that such explanation should not be given any credence in view of what transpired in the first trial. However, the learned trial judge came to his finding on the issue in this way: **H**

> To my mind the two statements are the same in the sense that they are related to the same incident namely Azizan was sodomized after September 1992. Azizan in his explanation said what he meant when he said in the earlier trial that he was not sodomized after May 1992 was that he was not sodomized in Dato' Seri Anwar's house when he was asked 'mengapa saya masih berkunjung ke rumah Dato' Seri Anwar'. He further said without any reservation in his explanation that 'kejadian liwat memang berlaku terhadap saya selepas Mei 1992 dan selepas saya berhenti kerja tetapi bukan di rumahnya'. **I**

[142] Now, the rule in re-examination is clear in that it is confined to matters touched on during cross-examination. Fresh evidence adding to or re-affirming evidence-in-chief is not permitted in re-examination.

[143] Learned public prosecutor however argued that the question asked was to clarify on matters pertaining to being sodomized and permissible under s 138 of EA 1950 which reads:

> The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

[144] Having considered the respective contentions, we are inclined to agree with the argument of the latter. The question is not totally out of context on matters raised earlier. Azizan was only asked to explain his earlier answer which prima facie appeared to be contradictory. At any rate, it could not be said that learned counsel for the appellants were totally shut out at the material time. Surely, they could have asked for leave to further cross-examine Azizan if indeed they felt that undue advantage was taken during the re-examination.

[145] Accordingly, we find no material substance in the complaint relating to the re-examination of Azizan and in our view no miscarriage of justice had occasioned when the learned trial judge overruled the objection.

[146] There was also a complaint from learned counsel for the first appellant that the learned trial judge misrecorded the evidence during the impeachment proceeding by the addition of two words to the evidence of Azizan, hence gave him greater credibility. According to learned counsel at p 1028 of the appeal record the two words added were 'dan bukan' to his question which reads in the context as follows:

> S: Adakah awak beritahu pihak polis kamu diliwat oleh Dato' Seri Anwar *dan bukan* dalam tahun 1994?
>
> J: Ada.
>
> S: Adakah tidak sebelum hari ini awak ada memberitahu mahkamah ini bahawa awak tidak ada memberitahu polis bahawa awak di liwat oleh Dato' Seri Anwar dan Sukma pada tahun 1994?
>
> J: Ada. (Words complained of are in bold).

[147] With respect, we are unable to agree that the mere addition of the two words gave Azizan greater credibility. Surely, the whole of his testimony has to be considered and not those words alone. Further, they have to be considered in the context of what were said overall. In addition, the legal principle on the finality to the contents of the notes of evidence recorded by a trial judge is quite clear. Not being the trial court, an appellate court has to rely on the learned trial judge's notes of evidence (see *Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457; *Loh Kwang Seang v Public Prosecutor* [1960] MLJ 271).

[148] Hence, we cannot accede to the request of learned counsel for the first appellant that those two words should be ignored or that they had an impact in the perception of the learned trial judge on the credibility of Azizan. In passing we note that this point was not raised at the first opportunity available thereby affecting its credence.

No medical examination of Azizan

[149] It was also the submission of learned counsel for the first appellant that since there was no medical report of Azizan and since he was not sent for medical examination there was no best corroborative evidence available. Further, it was urged upon this court that adverse inference should be drawn for such failure. And it was also submitted that the learned trial judge should have found SAC1 Musa, the investigation officer, in contempt of court since he openly contradicted himself in court.

[150] The learned trial judge found that there was no contradiction in the answers of SAC1 Musa as he was answering different questions. Further, it was also his finding that medical evidence was not the only method in which penetration could be established. And such view is not without any basis. In fact, we find merit in the argument of the learned public prosecutor that based on the evidence of an expert called by the appellants, namely Dr Zahari (DW3) it is obvious that after a lapse of time medical examination is not a reliable mean and not the only method to determine whether or not a person has been sodomized.

[151] In respect of an adverse inference to be drawn for the failure of SAC1 Musa to send Azizan for medical examination, we do not think it is within the scope of s 114(g) of EA 1950. In view of what transpired, there was nothing to indicate that there was an intentional suppression of evidence or an attempt to do so (see *Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560).

Disclosure of bribery by Azizan

[152] Another criticism in the finding of the learned trial judge on the reliability of Azizan as a witness is his failure to properly consider the bribery allegation. It was submitted for the first appellant that it was wrong for the learned trial judge to lightly put aside the evidence of DSP Zull Aznam who testified that Azizan had told him that it was on a promise of payment that he made the accusation against the first appellant.

[153] In his finding, the learned trial judge did not attach any weight to the evidence of DSP Zull Aznam on the issue of bribery. Reasons for doing so were given and having considered them we have no basis to differ. After all, the 'credibility of a witness is primarily a matter for the trial judge' (see *Dato Mokhtar bin Hashim & Anor v Public Prosecutor*). We also agree with the learned trial judge that being a senior police officer DSP Zull Aznam would have no problem in having such crucial piece of information recorded when he gave his two statements to the police in connection with his police report No 2706/97 (exh D44) dated 15 August 1997. DSP Zull Aznam's explanation

for the failure was that he was not sure of the truth of what Azizan told him. In our view, such reason is weak and unconvincing. It is not therefore surprising for the learned trial judge to come to such conclusion as he did.

[154] In addition, it was the evidence of Azizan that he made no such disclosure and could not have done so since he did not meet DSP Zull Aznam after his meeting with the first appellant. And he denied such suggestion under cross-examination.

Fabrication of the allegation by Azizan?

[155] Learned counsel for the first appellant also submitted that the accusation of Azizan against the first appellant was a fabrication, pure and simple. And that it was a political conspiracy against the first appellant.

[156] There was no denial that after the making of P5, Azizan went to see Mr Karpal Singh who was then a Member of Parliament and a practising lawyer for advice. Learned public prosecutor submitted that if indeed there was a political conspiracy and that what Azizan alleged was part of it and a fabrication, there was no reason for him to see Mr Karpal Singh to seek for advice and probably assistance. It was also the evidence of Azizan that Mr Karpal Singh promised to bring up the matter in Parliament.

[157] This aspect of the case was not addressed to by learned counsel for the first appellant at the appeal. Accordingly, we are of the view that what the learned public prosecutor has surmised is not without merit. The move by Azizan to see Mr Karpal Singh and the absence of any rebuttal from the first appellant on this issue made the assertion of fabrication a non-starter. And indeed, it must have been the case since SAC1 Musa found no trace of evidence of conspiracy or fabrication of sort.

[158] We are therefore of the view that this act of Azizan in consulting a lawyer for advice at that time when there was no hint of any prosecution against anyone only adds to his credibility and at the same time demolishing any theory of fabrication on his part or that he was under the influence of someone else writing the script for the downfall of the first appellant.

Azizan did not make police report earlier

[159] It is not in dispute that Azizan did not lodge any police report pertaining to his allegation of having being sodomized by the appellants. And for this failure, it was contended for the appellants that his allegation must be taken with suspicion.

[160] In the course of his testimony, Azizan was asked for his failure to lodge any police report. He gave his explanation one of which was that he did not think anyone would believe him let alone the police. He was conscious of the important position of the first appellant at that time. It was only after his conversation with one Umi Halifida that he had the idea of making P5 which was then sent to the Prime Minister. He was of the view that the Prime Minister was higher than the first appellant at that time. But P5 did not bring the desired result in that Azizan was instead arrested and made to retract its contents.

[161] This issue was not specifically considered by the learned trial judge when he dealt with the credibility of Azizan. Nevertheless, having heard and seen Azizan in the witness box and for other reasons that he gave, he found Azizan to be a truthful witness. Surely therefore it can be safely assumed that he must have taken into account this issue before coming to his conclusion. On our part, we have read the explanation of Azizan and we are of the opinion that it is perfectly plausible taking into account his station in life.

[162] At any rate, failure to lodge a police report is not fatal to the prosecution and it is not a prerequisite for the commencement of an investigation by the police. After all at best, a police report is either to show consistency or to contradict an informant's evidence in court (see *Apren Joseph v State of Kerala* [1973] Cri LJ 185; *Hairani bin Sulong v Public Prosecutor* [1993] 2 CLJ 79). In the case of *Public Prosecutor v Foong Chee Cheong* [1970] 1 MLJ 97, it was held that '... However important a document a first information report is, it can never be treated as a piece of substantive evidence and the fact that no first information report was made is not in itself a ground for throwing out a case.' per Gill J (as he then was) at p 97. In our view that is a correct expression of the law on the point.

Azizan coming back to work for Datin Azizah

[163] A question was also posed by learned counsel for the first appellant to drive home a point that Azizan should not be believed. He argued that if indeed Azizan was sodomized by the first appellant there was no reason for him to return to work for Datin Seri Wan Azizah in 1994.

[164] Azizan was asked the same question in the witness box. His reply was that he tried to return to work but could only withstand for two weeks as he was worried of what had happened to him before might occur again. In fact prior to being asked this question, he was asked why he continued to work for Datin Seri Wan Azizah after the first time he was sodomized by the first appellant. His answer was that he was then still confused and distraught. He also had great respect for Datin Seri Wan Azizah and that her children were close to him.

[165] There appears to be no specific finding by the learned trial judge on this point. But one thing is clear. There was no contrary evidence tendered by the first appellant to rebut the explanation given. Hence, it can safely be accepted as a credible explanation under such circumstances (see *Rattan Singh v Public Prosecutor* [1971] 1 MLJ 162; *Ryan v Ross & Anor* [1963] 2 QB 151).

The details of the incident given by Azizan and finding of facts in relation to Azizan's credibility

[166] The learned trial judge further came to his finding on the credibility of Azizan based on his detailed account of the incident. Learned counsel for the first appellant submitted that such account should not be accepted as anyone could have done the same by just watching pornographic movies.

[167] With respect, we do not think it would be that simple. If Azizan were rehearsing it from a movie that he had seen then surely he could not have withstood the cross-examination from the defence team that spanned for

seven days. It would not have been easy for anyone, let alone a mere driver, to maintain consistency in his answers of the incident if indeed the details were 'acted' from a movie. Moreover, the learned trial judge was there to watch his demeanour and other indicators while in the witness box. These are factors which we are not privileged to observe at the appellate stage, hence the finding of the learned trial judge has to be given serious consideration and weight that it deserves (see *Bhojraj v Sitaram*; *Ooi Choon Lye v Lim Boon Kheng & Ors*).

[168] There are also other findings of facts of the learned trial judge that led him to believe Azizan and finding him credible. And these findings did not come by without justifications. The learned trial judge was well aware that for an offence as in this case it would be easy to allege but difficult to rebut. And for that, he took all the precautions to ensure that all the legal requirements in determining the truthfulness of Azizan were met. He also allowed impeachment proceeding thus enabling all parties to hear the explanation of Azizan for the apparent contradictions in his statements. And in the process, he found factual situations which this court is not in the position to question. For instance, the learned trial judge found as a fact that there was no challenge to the evidence of SAC1 Musa that the first appellant directed him to stop investigation on the police report lodged by DSP Zull Adnam. It was also the finding of fact of the learned trial judge that P5, the statutory declaration of Azizan, was not altered. And it was also his finding of fact that Azizan did not tell DSP Zull that it was due to money that he made the allegation. The foregoing factors enhance the finding of the learned trial judge on the credibility and truthfulness of Azizan which this court cannot and should not conveniently overturn. It is trite law that an appellate court should be slow in interfering with any finding of fact by a trial court (see *Public Prosecutor v Wan Razali Kassim* [1970] 2 MLJ 79).

Press statements

[169] Learned counsel for the first appellant argued that from the press statements made by the Prime Minister and the then Inspector General of police (D14, D18, D41, D42) it was clear that there was no evidence found by the Special Branch on the allegations against the first appellant. Obviously, this submission was raised to undermine the credibility of Azizan as a witness. However, it should be noted that these press statements were made in relation to the Travers Police Report No 2706/97 lodged by ASP (now DSP) Zull Aznam in connection with the leaflet entitled *Talqin Kutuk Anwar Ibrahim*. Whereas the charges preferred against the appellants arose from the Dang Wangi Report No 14140/98 lodged by Mohamed Azmin bin Ali on 19 June 1998.

[170] In his judgment, the learned trial judge approached such issue in this way:

> With all humility, I am of the view that these press statements have no connection with the charges on which Dato' Seri Anwar is being tried. They are irrelevant. The charge against Dato' Seri Anwar was brought about as a result of a second investigation carried out by the police in respect of Dang Wangi Report No 14140/ 98 lodged by Mohamed Azmin bin Ali on 19 June 1998. The court has to

decide on the charge according to the evidence adduced in court and nothing else. The press statements cannot be regarded as evidence in this trial, as they are, as what I said, irrelevant.

[171] It was also submitted by the learned public prosecutor that the contents of D41 should be regarded as hearsay evidence as it was based on the Special Branch report which was not before the court.

[172] With respect, we are inclined to agree with the reasoning of the learned trial judge. We are of the opinion that the result of an investigation in an earlier police report does not necessarily negate any probable positive result in an investigation based on a subsequent police report. Indeed as the learned trial judge concluded that the earlier report would be irrelevant to the later report.

[173] Hence overall we find no merit in this complaint and specifically in relation to the credibility of Azizan.

Other complaints on the finding of credibility of Azizan

[174] It was the complaint of learned counsel for the first appellant that the learned trial judge repetitively said that Azizan was a reliable witness thus indicating that he was confused.

[175] With respect, we are unable to accept such submission. No doubt the learned trial judge mentioned on several occasions in his grounds of judgment that he found Azizan a reliable witness. However, they were not without relevance. Each reference was related to a point raised by the defence pertaining to the credibility of Azizan. We therefore find the contention to be without merit as well.

[176] Next complaint was the allegation that the prosecution failed to call critical witnesses that could have helped in determining the credibility of Azizan. And that included the Special Branch report.

[177] We have already dealt with this point in relation to s 114(g) of EA 1950. At any rate, there was nothing to prevent the defence from calling those witnesses who were considered by them to be crucial on the credibility of Azizan. There was no reason for them to expect the prosecution to call each and every witness available (see *Teh Lee Tong v Rex* [1956] MLJ 194).

[178] In his summary on the testimony of Azizan *vis-à-viss* his credibility and reliability as a witness of truth, the learned trial judge came to his finding thus:

... it is my firm finding in relation to the charges against both accused that he is a wholly reliable, credible and truthful witness taking into consideration the whole of his evidence not withstanding inconsistencies, discrepancies and contradictions which did not detract the weight and truth of his evidence in relation to the ingredients of the charges against both accused.

Azizan has truthfully and without embellishment, distortion or exaggeration in his evidence narrated in minute detail how he was sodomized by Dato' Seri Anwar and Sukma at the date and place as stated in the charges against both

accused. Azizan in his evidence gave so much graphic detail of the preliminaries, and a vivid description how both accused penetrated his anus with their respective penises. His description and direct experience of being sodomized completely negatives any probability that Azizan was tutored or coached as claimed by the defence counsel. No reasonable person or judge could on the evidence come to any other finding than the firm and unescapable *(sic)* conclusion that both accused sodomized Azizan gaily whetting their appetites at Tivoli Villa. Only persons directly and actively subjected to these acts of sodomy would be able to narrate the details of the whole episode.

I am of the firm view that Azizan was speaking the whole truth when he said in evidence that he was sodomized at Tivoli Villa between the months of January and March 1993 by both accused as stated in the charge.

...

He has nothing to gain whatsoever but stood to lose everything if his evidence was not true as this would affect his self respect and his good name and standing in the eyes of the public and would also bring embarrassment to his family members. Further one cannot conceive that one would fabricate a serious charge of sodomy against the Minister of Finance and Deputy Prime Minister of Malaysia.

It cannot be denied that there are discrepancies in Azizan's testimony. I have considered these discrepancies earlier and had made my finding on them. Apart from that, I do not find any serious discrepancies that would affect Azizan's credibility or reliability as a witness of truth on the ingredients of the charges against both the accused.

... taking into account the credible manner in which he gave evidence, his demeanour while giving evidence and his unchallenged and unshaken evidence on the details of sodomy committed at Tivoli Villa which is consistent with itself and the other evidence adduced by the prosecution, I have no hesitation in coming to the conclusion and a finding that Azizan's evidence is wholly credible on all the facts relating to the act of sodomy committed on him by both the accused.

[179] The ultimate question to ask then is whether the learned trial judge was justified in arriving at such finding. As shown in this judgment we have considered all the complaints and contentions advanced for the appellants which were aimed at impugning the findings of the court below in connection with the testimony of Azizan, his credibility and reliability as a witness and for the reasons given it is our conclusion that the learned trial judge was correct and justified to come to his finding as he did in that 'Azizan"s evidence is wholly credible on all the facts relating to the act of sodomy committed on him by both the accused'.

The confession of second appellant ('P4')

[180] We now deal with another evidence relied upon by the learned trial judge. This is the confession of the second appellant (P4). There are three issues to consider, namely, its admissibility, its value as against the second appellant being the maker and as against the first appellant being the co-accused.

The admissibility of P4

[181] The admission of P4 by the learned trial judge was questioned by the learned counsel for the appellants contending, inter alia, that it was not made voluntarily and as a preliminary objection the issue of jurisdiction of the trial court to conduct a trial within a trial was also raised.

[182] On the jurisdiction issue, it was the conclusion of the learned trial judge that the trial court had jurisdiction to determine the admissibility of P4. It was his view that the word 'inquiry' in s 2 of CPC should not be confined to preliminary inquiry as submitted by learned counsel for the appellants. Thus, he opined that '... Once the statement or confession is recorded by the magistrate it can be used in any court if it is relevant and it becomes a duty of the trial court or the court which hears the inquiry to determine the admissibility of the statement or confession'.

[183] We have considered the view of the learned trial judge and the argument of the learned counsel for the appellants. We find no reason to interfere with the conclusion of the court below.

[184] On the issue of admissibility of P4, the objection remained, namely, that it was not voluntarily given and that the recording was contrary to procedure.

[185] Before admitting P4, the learned trial judge conducted a trial-within-a-trial solely to determine the issue of whether it was given voluntarily.

[186] However, the defence added other points in objecting to the admission of P4, including the failure of the recording magistrate to note down in P4 itself the motive of the second appellant in making it. It was further contended that it was wrong for the learned trial judge to accept the evidence of the recording magistrate given from the witness box as regards motive since that would be contrary to ss 91 and 92 of the EA 1950.

[187] Before us, the same arguments were put forward. In addition, it was submitted, inter alia, that before admitting P4 the learned trial judge should have made a ruling whether the prosecution had proved beyond reasonable doubt that P4 was made voluntarily and that such admission should have been reviewed upon the production of the letter (D28) written by the second appellant to the first appellant. And it was also contended that it was wrong for the learned trial judge to compel the second appellant to give his testimony during the trial-within-trial. It was the submission of learned counsel for the second appellant that there is a right to remain silent for a maker of a confession at the end of the prosecution's case in a trial-within-trial.

[188] Now, it is settled law that '(N)o 'statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement (*Ibrahim v R* [1914] AC 599, 609 per Lord Sumner) and this test was accepted by the House of Lords as the correct approach in *Director of Public Prosecutions v Ping Ling* [1975] 3 All ER 175; [1976] AC 574 in which the House said that is not necessary before a statement is held to be inadmissible because it is not shown to have been voluntary, that it

should be thought or held that there was impropriety in the conduct of the person to whom the statement was made, and that what has to be considered is whether a statement is shown to have been voluntary rather than one brought about in one of the ways referred to. It appears from the decision in *Ping Lin* (ante) that the classic test of the admissibility of an accused's confession that the prosecution must establish beyond reasonable doubt that it was voluntary, in the sense that it was not obtained from him either by fear or prejudice or hope of advantage created by a person in authority, or by oppression, should be applied in a manner which is part objective, part subjective ... *It is open to an appellate court to interfere with the finding on a question of fact as to the voluntariness of a confession if the impugned finding has been reached without applying the true and relevant legal tests and consideration of relevant matters* (*Sarwan Singh v State of Punjab* AIR [1957] SC 637, 643; *Public Prosecutor v Thum Soo Chye* [1954] MLJ 96, 99).' per Abdoolcader FJ in *Dato' Mokhtar bin Hashim v Public Prosecutor* [1983] 2 MLJ 232 at p 272. (Emphasis added.)

[189] And it is also the law that the 'question of admissibility of evidence is for the judge and not the jury to decide. ... Where this calls for a decision as to whether the statement is free and voluntary a question of fact is involved and that question must be decided, like any other question of fact, on evidence. And to decide it the judge must listen not only to any evidence tendered by the prosecution but also to any evidence relating to the issue tendered by the defence, including if tendered the evidence of the prisoner.' per Thomson LP at p 68 in *Yaacob v PP* [1966] 1 MLJ 67. (Emphasis added.)

[190] Accordingly and keeping the principles of law in the forefront of our minds, we have given serious consideration to the various points raised and have carefully perused the manner in which the learned trial judge dealt with them and overall we have no reason to interfere with his findings. He was in the position of seeing and hearing the witnesses called and made certain findings of facts. Such findings an appellate court should be slow to interfere. In *Chan Teng Cheong v Public Prosecutor* [1967] 1 MLJ 217, his Lordship Azmi CJ (Malaya) (as he then was) said this at p 219:

> In our view this is a question of fact and of credibility. The learned judge had seen these two witnesses who gave their evidence, and he had in his finding on this point, found there was no such inducement. We see no reason why this court should interfere with that finding of fact made by the learned judge.

[191] In respect of the other contentions described as errors on the part of the learned trial judge, we do not think there are any merits in them. And that perhaps explains for the lack of any good authority submitted to us. In our view, once the learned trial judge ruled that P4 was given voluntarily that should meet the requirement. There is no legal necessity for him to expressly state that the standard of beyond reasonable doubt had been met in order for the admission to be good in law. It is implied from the finding.

[192] On the allegation of compulsion for the second appellant to give his evidence, we find no merit in it. In the record of appeal, it is clear that what the learned trial judge said was that the second appellant was to give his evidence if he so desired.

[193] As for D28, the point was already well considered by the learned trial judge and he made his findings. We have no reason to differ. Indeed, D28 was not produced during the trial-within-trial and there was no good reason for the failure. Further, we agree with the learned trial judge that the contents of D28 are mere repetition of what were said by the second appellant during the trial-within-trial.

[194] Hence, we hold that P4 was properly admitted in evidence by the learned trial judge in the exercise of his discretion. As an appellate court, we are not convinced that the decision by the learned trial judge to admit P4 was 'reached without applying the true and relevant legal tests and consideration of relevant matters". Accordingly, we find that there is no basis for the grievance of the appellants on the issue admissibility of P4.

P4 as against the second appellant

[195] For a confession to be of any use, it is also necessary for it to be true and trustworthy. However a trial court is also entitled to accept part of it and reject the rest (see *Lim Yow Choon v Public Prosecutor* [1972] 1 MLJ 205).

[196] Now, a confession of a maker having been duly admitted in evidence is sufficient to convict him if the court is satisfied that it is true and trustworthy. And even if the maker were to retract it subsequently it can still be used to convict him so long as the court is satisfied of its truth. This is settled law. The then Federal Court in *Osman & Anor v Public Prosecutor* [1967] 1 MLJ 137 while disagreeing with the Indian cases cited, adopted the pronouncement of the principle in *Yap Sow Keong v Public Prosecutor* [1947] MLJ 90 that stated as follows:

> In our view the law as to the admissibility of retracted confessions in evidence is clear, and put shortly it is that an accused person can be convicted on his own confession, even when it is retracted, if the Court is satisfied of its truth. We do not agree with those Indian decisions which lay down that before a person can be convicted on his retracted confession there must be corroborative evidence to support it.

[197] It is interesting to note that in *Osman & Anor v Public Prosecutor*, the Privy Council did not expressly disagree with the view of the then Federal Court on the issue (see also *Tinit & Ors v Public Prosecutor (No 2)*; *Dato' Mokhtar bin Hashim v Public Prosecutor*).

[198] There are of course views expressed that although in principle it is possible for an accused person to be convicted on his confession standing alone provided the court is of the opinion that the incriminating parts thereof are true, in practice the court always looks for corroboration (see *Public Prosecutor v Chong Boo See* [1988] 3 MLJ 292; *Public Prosecutor v Lai Pong Yuen & Ors* [1968] 1 MLJ 12). With respect, these cases made no reference to the earlier decisions of the higher courts.

[199] On our part, we find no justification to depart from those earlier decisions of high authority which in any event are binding on this court. At any rate, the caveat stipulated in those contrary views indicates that such

additional requirement is only a matter of practice and prudence. Common sense of course dictates that where corroborative evidence is found it should not be ignored.

[200] Before us, it was also the contention of learned counsel for the second appellant that P4 should not be relied upon to find the guilt of his client simply because it was not given voluntarily.

[201] In view of our agreement with the finding of the learned trial judge on the admissibility of P4, we do not think such submission can prevail. In any event, we have examined the careful and thorough approach undertaken by the learned trial judge before coming to his conclusion and we are inclined to agree with him.

[202] It was also submitted that P4 ought not to be relied upon as it did not contain the truth, for instance, the statement therein pertaining to the residence of the first appellant during the period referred to which was incorrect and that the medical report on the second appellant indicated that he was not sodomized.

[203] We note that the learned trial judge was careful in his analysis of the facts and circumstances before coming to his conclusion as to the truth of the statements in P4. We would also say that any discrepancies should be taken as indicators that no force, inducement or threat was used when P4 was given. And we agree with learned trial judge's findings that the details in P4 are indicative of the fact that what were said by second appellant could not have been couched or of recent origin (see *Juraimi bin Hussin v Public Prosecutor* [1998] 1 MLJ 537; *Dato' Mokhtar bin Hashim v Public Prosecutor*. On our part having perused the contents of P4 and the evidence adduced as a whole we are convinced that it contains the truth particularly pertaining to the incident as per charges. Indeed, the sequence given by the second appellant in P4 when the offences were committed tallies with the version of Azizan. For instance, both Azizan and the second appellant said that the first appellant was in the toilet after having sodomized Azizan. If that is not the truth then it would have been too much of a coincidence for both Azizan and the second appellant to make such reference. Such minute detail could not have come easily if there was no truth in what both were saying and there was no assertion that the two colluded when making their respective statements or that the prosecution gave Azizan such information. Anyway collusion could not have been possible since there were also differences in the statements of the two persons in term of other details. Those would have been avoided if indeed Azizan was duly informed of what the second appellant had said in P4. One such difference is that in P4 the second appellant said that he did not ejaculate while Azizan said otherwise. We would therefore say that P4 corroborated the testimony of Azizan.

[204] In P4, the second appellant admitted to have had previous homosexual relationships. However, the second appellant in his defence make no specific denial of the above mentioned statement. Further, there is also the evidence of PW2 — Dr Mohd. Fadzil bin Man to consider who in his evidence, under cross-examination, stated that he had the notes made by him in regard to the second appellant. Hence, we are in agreement with the learned trial judge in his view on the importance of the evidence of PW2 when he said:

> The importance of the evidence of this witness cannot be overlooked and it is this, it establishes the fact that Sukma was involved in homosexual activities with his adopted brother (adik angkat) and his business partner ... What Sukma told this witness that he was involved in homosexual activities is a confession as defined under s 17 of the Evidence Act 1950 and its voluntariness is not disputed. This evidence is admissible to establish the fact that Sukma is a homosexual and is relevant to the issue of sodomy which is the subject matter of the charges against him.

[205] And save for his bare denial on the truth of the material parts of P4, the second appellant adduced no further evidence to support his assertion that the contents were orchestrated by the police. With respect, we do not think such stand assisted his case in anyway.

[206] As regards the medical reports on the second appellant the learned trial judge found that their nett effect was neutral, hence he did not accept them. Having perused the evidence of the doctors called and from their reports, we are inclined to agree with the conclusion of the learned trial judge.

[207] We are therefore of the view that the learned trial judge was correct in his appreciation of the value and weight to be attached to P4 and the resultant conclusion arising therefrom in respect of proof against the second appellant. Thus, we find no merit in the complaint of the second appellant on this issue.

P4 in relation to the first appellant

[208] In his approach on this issue the learned trial judge first came to a conclusion that he required no aid from P4 in dealing with the charge against the first appellant. He said that the evidence of Azizan was sufficient for that purpose. Alternatively, he was inclined to follow the interpretation of s. 30 of the EA 1950 by the Singapore Court starting with the case of *Chin Seow Noi & Ors v Public Prosecutor* [1994] 1 SLR 135. And the learned trial judge came to the finding thus:

> As a result I conclude that a confession by an accused is capable of standing on its own and be used against a co-accused to support a conviction provided the evidence emanating from the confession satisfies the court beyond reasonable doubt of the accused's guilt. The confession of Sukma can therefore be used standing on its own against Dato' Seri Anwar.

[209] The alternative approach undertaken by the learned trial judge was severely attacked by learned counsel for the appellants submitting that in so doing the principle of binding precedent was infringed. Learned counsel of course was referring to the earlier decisions of the then apex court of this country. In *Herchun Singh & Ors v Public Prosecutor*, his Lordship HT Ong CJ (Malaya) at p 210 said:

> In our judgment, however, the proper interpretation of section 30 is that of Bose J in *Kashmira Singh*, as follows:

> The proper way to approach a case of this kind is, first to marshall the evidence against the accused excluding the confession altogether from consideration and see whether 'if it is believed', a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the judge is not prepared to act on the other evidence as it stands even though, 'if believed', it would be sufficient to sustain a conviction. In such an event the judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept.

[210] And in *Yap Chai Chai & Anor v Public Prosecutor* at p 222, the principle was reiterated in these words:

> On behalf of the first appellant, it was further argued that the second appellant's confessional statement should not have been used or considered as evidence, against the first appellant, of common intention. We rejected this contention: the question having been concluded by authority, being a decision of this court in *Herchun Singh & Ors v Public Prosecutor* [1969] 2 MLJ 209, 211 on the proper interpretation and application of section 30 of the Evidence Ordinance 1950 (now the Evidence Act No 56) which reads:
>
> > 30(1) When more persons than one are being tried jointly for the same offence, and a confession made by one of those persons affecting himself and some other of those persons is proved, the court may take into consideration the confession as against the other person as well as against the person who makes the confession.
>
> The statement of principle therein enunciated was that the learned trial judge was right in taking the confession of one accused into consideration against the other to lend assurance to the other evidence against them in believing the accused to be guilty.

[211] His Lordship Hashim Yeop Sani J (as he then was) in *Dato' Mokhtar bin Hashim v Public Prosecutor* expressed his view on the rationale of the principle when he said this at p 268:

> Stated simply the principle is as follows. It would be proper for the trial judge to take the confession of one accused into consideration against the other accused to lend assurance to other evidence the other co-accused. ... As to why the law is strict on the application of a confession of an accused person as against a co-accused is not difficult to appreciate because it is based on a very sound principle. Since a confession is neither required to be given on oath nor to be made in the presence of the other co-accused whom it implicates it is therefore not wrong to describe it as a very weak type of evidence which should not be allowed to form the basis or foundation of a conviction but should only be used in support of other positive evidence. This, in my opinion, is the intention of section 30 of the Evidence Act when it used the words "may take into consideration.

[212] And in *Public Prosecutor v Nordin bin Johan & Anor* [1983] 2 MLJ 221 at p 222, his Lordship Raja Azlan Shah LP (as his Majesty then was) also gave his instructive view on s 30 in this fashion:

> Section 30 provides that this statement may be taken into consideration against the two respondents but on the decided authorities the pre-requisite to this is that there must be some cogent evidence against them quite apart from the statement of the third accused. The nature of this evidence which would be extraneous to the confession of a co-accused and its qualitative and probative value in relation to the charge must *ex necessitate rei* be a factual matter in the context and circumstances of the particular case.

[213] (See also *Juraimi bin Hussin v Public Prosecutor*.)

[214] It is therefore obvious that the learned trial judge in the present case had departed from the earlier decisions of the highest court in this country preferring to follow the interpretation and reasoning of the Singapore Court of Appeal. Unfortunately, the learned trial judge missed the point. In *Chin Seow Noi & Ors*, the learned judge there did not follow *Herchun Singh & Ors* as he took the view that it was not binding on Singapore courts being a decision of the then Malaysian Federal Court rendered after Singapore became an independent nation. In addition, it was observed that the Indian cases on the interpretation of s 30 should not be applicable in view of the crucial differences between the Indian Evidence Act 1872 and the Singapore Evidence Act including the definition of 'evidence' therein. In short, the Singapore Court of Appeal declined to adopt the 'narrow construction' propounded in the leading cases of *Bhuboni Sahu v R* AIR 1949 PC 257 and *Kashmira Singh v State of Madhya Pradesh* AIR 1952 SC 159 which were followed in *Herchun Singh & Ors*.

[215] With respect, we are of the view that it was incorrect for the learned trial judge in the present case to depart from the obvious binding effect of the decisions in *Herchun Singh & Ors* and *Yap Chai Chai & Anor*. As for his reference to the case of *Noliana bte Sulaiman v Public Prosecutor* [2000] 4 MLJ 752, we do not think the learned judge there went as far as saying 'that a confession by an accused is capable of standing on its own and be used against a co-accused to support a conviction provided the evidence emanating from the confession satisfies the court beyond reasonable doubt of the accused's guilt'. But if there was an impression given to that effect then we say that that would be erroneous in law and not reflective of the current law of this country. As to the need for the lower courts to observe the principle of stare decisis, we need only to refer to *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1 in which the Federal Court reminded the lower tiers in these words (at p 12):

> The doctrine of stare decisis or the rule of judicial precedent dictates that a court other than the highest court is obliged generally to follow the decisions of the courts at a higher or the same level in the court structure subject to certain exceptions affecting especially the Court of Appeal.

[216] Now, the question to ask is whether such misdirection should inevitably lead to the reversal of the finding of guilt of the first appellant or whether as an appellate court we can reevaluate P4 as against the first appellant bearing in mind the principle enunciated in *Herchun Singh & Ors* and *Yap Chai Chai & Anor*. It is to be noted that the guilt of the first appellant as found by the learned trial judge was not entirely based on P4. In fact, he made it plainly clear that he was prepared to find the guilt of the

first appellant solely on the testimony of Azizan whom he found to be a credible witness of truth. He said this:

> Apart from the confession there is the evidence of Azizan who testified that he was sodomized by Dato' Seri Anwar at Sukma's apartment at Tivoli Villa at about 7.30pm between January and March 1993 as stated in the charge against him. This evidence was not successfully challenged by the defence, though an attempt was made to challenge it. I accepted his evidence for the reasons which I had stated when I dealt with the issue of Azizan's credibility in the earlier part of this judgment and made a ruling that Azizan is a reliable and truthful witness. His evidence is wholly reliable and capable of belief, which I accept. It is indeed a very strong piece of independent evidence to prove that Dato' Seri Anwar committed sodomy on Azizan as stated in the charge against him. I am prepared to act on this evidence alone independently, disregarding and ignoring the confession on the principle as laid down in *Herchun Singh*'s case. It is therefore not necessary for me to call the confession in aid.

[217] We have given this issue our anxious consideration and we are of the view that we can re-evaluate the value of P4 in relation to the first appellant on the same rationale that we are entitled to review the admissibility and weight to be given to a confession.

[218] As indicated earlier, in his grounds of judgment the learned trial judge held that even without P4 he was prepared to act on the evidence of Azizan independently to prove that the first appellant 'committed sodomy on Azizan as stated in the charge against him'. The question is: was he right in making such a finding?

[219] We have already expressed our view on the criticism levelled against the evidence of Azizan and our concurrence with the finding the learned trial judge. Hence, we are of the view that the learned trial judge was right in coming to such a finding.

[220] Next, should P4 be taken into 'consideration against the other (the first appellant) to lend assurance to the other evidence against them in believing the accused (first appellant) to be guilty'? We find no reason why it should not be done. And as we have given our view on the standing of P4 in terms of its admissibility and its truth cum trustworthiness, it does therefore lend assurance to the other evidence, specifically to the testimony of Azizan, in believing the guilt of the first appellant.

[221] We are also of the view that the testimony of PW2 is quite relevant in this respect. The learned trial judge found that what the second appellant told PW2 amounted to a confession under s 17 of the EA 1950. And in his statement to PW2, the second appellant told him that he had been having homosexual relationship with his adopted brother. The second appellant denied making such disclosure to PW2. Howeve,r in the face of the notes taken by PW2 so soon after examining the second appellant and with only a bare denial being offered to counter the evidence of PW2, we are inclined to agree with the finding of the learned trial judge that the evidence of PW2 'establishes the fact that Sukma was involved in homosexual activities with his adopted brother'. And who was the adopted brother referred to? There was no suggestion that the second appellant had another adopted brother

besides the first appellant. Further, the first appellant never denied that the second appellant was his adopted brother. Bearing in mind the above mentioned facts alluded to by the second appellant and viewing the evidence on this aspect in totality, we are of the view that the learned trial judge did not err in his conclusion that the adopted brother referred to therein was none other than the first appellant. No doubt the testimony of PW2 is not directly on the allegation as per charge. But it does have strong bearing on some of the material statements in P4 particularly on the history of sexual relationship of the second appellant and the first appellant thereby removing or diluting any suggestion that P4 is inherently incredible in contents.

[222] In summary, though we agree with the submission of learned counsel for the appellants on the application of s 30 of the EA 1950 we do not think such misdirection by the learned trial judge should nullify the whole of the convictions of the appellants. And as we have done, we find P4 does lend assurance to the other evidence on the guilt of the first appellant in that 'cogent evidence' existed against him 'quite apart from the statement' of the second appellant.

The defences proffered by the first appellant

(a) Defence of alibi

[223] In view of what we have said earlier on, namely, that the first appellant never served a notice of alibi or applied for an adjournment to serve one in connection with the amended charge, any admission of evidence pertaining to a defence of alibi would be contrary to the established legal principle. As such, there is no basis for the first appellant to complain that he has been deprived of his constitutional right to a fair trial. He chose not to raise such defence or failed to comply with the relevant statutory provision. No blame should therefore be imposed upon anyone else. Accordingly, we do not think the invocation of the proviso to s 60(1) of the CJA should be ruled out.

[224] It was obliquely submitted that it was a joint trial, hence the application by the second appellant would suffice. With respect, the contention missed a point in that at the commencement of the trial such a stand was not taken. There was just no application by the first appellant for an adjournment and he did not even associate himself with the application by the second appellant. As for the refusal by the learned trial judge to grant an adjournment to the second appellant, reason was given and we will deal with that shortly.

[225] In the event that we are wrong in our view above in respect of the first appellant, then arising from what had transpired before the learned trial judge, the first appellant could not complain that his trial was conducted unfairly thus nullifying the trial as a whole. If at all it was to his advantage in that despite the absence of the required notice the learned trial judge proceeded to hear the alibi evidence tendered. That was of course possible as the public prosecutor did not object to such evidence being adduced. Further, if indeed the first appellant or his team of learned counsel seriously

believed that it was absolutely wrong in law thus nullifying the trial, for the learned trial judge to accept such evidence in the absence of a notice, there was no explanation given for doing what they did, in that they proceeded to adduce alibi evidence.

[226] Witnesses were called to show that the first appellant could not have had the opportunity to commit the offence as he was elsewhere. Attempts were made to account for the days the first appellant was in the country. Being the then Deputy Prime Minister his movements were recorded. Diaries were referred to and allegation made that they had been seized by the police during the investigation of the case. And that appears to be true with the existence of IDD11 dated 5 September 1998 — the search list which we note was never formally tendered and marked as an exhibit. Anyway for all its worth, the list does not show that the 1993 diary was seized. That would have been a crucial piece of evidence on the defence of alibi. Thus, it remains a pure assertion by the defence that the 1993 diary was taken by the police. During the hearing of these appeals, the learned public prosecutor informed the court that all the records in their possession were given to the defence.

[227] Be that as it may, the learned trial judge made the following findings:

(a) that for the period from 4 February to 31 March 1993 the whereabouts of the first appellant were proved by the witnesses called;

(b) that 15 February 1993 was excluded on account of the evidence of Azizan that he was working the day before the incident;

(c) that 19 February 1993 should not be excluded even though it was a Friday as Azizan could have prayed his Zohor prayer in the office. Objection was taken on this finding due to prior observation by the learned trial judge in respect of Friday prayer. However, nothing serious turned on this as finally the learned trial judge was only interested in the period from January 1993 to 3rd February 1993;

(d) that the prosecution did not challenge the alibi for the period from 4 February 1993 to 31 March 1993, hence deemed accepted;

(e) that the period between the whole of January 1993 and 3 February 1993 remained unaccounted for and no evidence was adduced by the first appellant on his movements during that period; and

(f) 'the defence of alibi fails to raise a reasonable doubt as to his guilt or in the truth of the prosecution case'.

[228] Before us, learned counsel for the first appellant submitted that the proceeding on the defence of alibi was a nullity or that the finding arrived at by the learned trial judge was contrary to established legal principle on burden of proof for the following reasons, inter alia:

(a) that the learned trial judge erred in placing a heavier burden of proof on the defence by expecting a proof of beyond reasonable doubt. And this could be discerned from the use of the word 'conclusive';

(b) that there was no rebuttal evidence adduced by the prosecution on the evidence tendered by the defence; A

(c) that between January 1993 and 3 February 1993 there was extensive work carried out in the apartment of the second appellant thus no necessity for alibi;

(d) that the learned trial judge doubted on the receipt tendered by the defence although there was no rebuttal evidence from the prosecution; and B

(e) that it was the evidence of the second appellant that he only entered the apartment in April 1993 yet the learned trial judge refused to accept such assertion when there was no rebuttal evidence adduced by the prosecution.

C

[229] With respect, we are unable to agree with the submission that the findings of the learned trial judge on the evidence of alibi of the first appellant were flawed. Some of those findings are findings of facts in which this court should be slow to interfere. On the use of the word 'conclusive' by the learned trial judge in the course of his analysis of the evidence, we do not think he intended it to mean that it should be automatically equated at all times to the phrase 'beyond reasonable doubt' as ordinarily understood in evidential term. It has to be taken in the context of its usage. For instance, when the learned trial judge in his grounds of judgment used the phrase 'his evidence when he said there was no bed in the apartment cannot be accepted as conclusive that there was no bed or mattresses in the other rooms' it could not be understood to mean that the learned trial judge expected the witness to prove the issue 'beyond reasonable doubt' as required of the prosecution. All it means is that such evidence on its own is not sufficient as proof of the fact asserted and that more is needed before it can be said that such fact is proved to the standard required of the party asserting it. And in the context of the foregoing phrase, it should be understood to mean the standard of proof expected of the defence which is 'on the balance of probabilities'. We are fortified in our view with the correct reference by the learned trial judge of the relevant law.

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[230] Now, from the evidence tendered we do not think the learned trial judge should be faulted when he came to the conclusion that for the period from January 1993 to 3 February 1993 the first appellant failed to account for his movements or whereabouts. The only explanation given by the first appellant was that during that period the apartment was being extensively renovated. The learned trial judge considered the evidence adduced on that issue and made his finding. We will deal with this point in greater detail later on in this judgment. Incidentally, in view of the period which the learned trial judge was looking at and which we have no doubt to be correct, the dispute on the relevance of 19 February 1993 was no longer of concern.

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[231] Accordingly, we are inclined to agree with the conclusion of the learned trial judge that for the period from the whole of January 1993 to 3 February 1993 nothing was shown on the movement of the first appellant.

I

Appellants at Tivoli Villa?

[232] The alleged renovation of the apartment at Tivoli Villa became the common ground for the appellants in relation to their respective defence of alibi. In passing, we do not think such evidence can strictly be construed as alibi evidence as ordinarily understood.

[233] Several witnesses, (Encik Rahimazlan (DW4), Encik Tan Seng Khoon (DW9) and Encik Chee Too Nam @ Chin Too Nam (DW8)) were called aimed at showing that indeed for the period from January 1993 to 3 February 1993 the apartment was under extensive renovation. It was also produced a letter from Bandar Raya Developments Bhd (exh D36). Even the purchase of a bed became an issue. The learned trial judge went on to consider each and every one of the evidence adduced and came to his findings, inter alia:

(i) that in the face of the evidence of Azizan and P4 the denial by the first appellant to be at the apartment as alleged in the charge must be rejected;

(ii) that 'from the evidence of DW4 and DW9 the technical supervisor of Bandar Raya Developments Bhd at the material time it was established that there was a major renovation of the bathroom to the master bedroom only';

(iii) that the second appellant had unrestricted and free access to the apartment;

(iv) that the receipt (D35) purportedly issued on the purchase of the beds and divans appeared to be new and nothing shown who issued it;

(iv) that the testimony of DW4, being an interested witness should be treated 'with suspicion and caution';

(v) that the evidence of DW9 'when he said there was no bed in the apartment cannot be accepted as conclusive that there was no bed or mattresses in the other rooms' since 'he only noticed the renovation works in the master bathroom'; and

(vi) that the evidence of Azizan was preferred to that of DW4 and DW9.

[234] Before us, learned counsel for the appellants complained that the learned trial judge committed errors in assessing the evidence adduced on alibi. The basic complaints are as follows, inter alia:

(a) that it was unchallenged the evidence of the second appellant that there was no bed in the apartment before 12 February 1993;

(b) that the evidence of DW4 was not rejected but only treated with suspicion; and

(c) that the learned trial judge did not assess the evidence of Azizan with the other evidence available.

[235] Overall from our reading of the evidence adduced in relation to the apartment at Tivoli Villa, we are unable to agree with the contention that the findings of the learned trial judge were made without any consideration of the other evidence adduced. He did assess the evidence of the second appellant and the other witnesses called as to the availability of the apartment on the one hand and the evidence of Azizan's and P4 on the other and came to his conclusion that he preferred the evidence of Azizan. That of course was his assessment of witnesses which as an appellate court we should be slow

to interfere. And we have no reason to say that the conclusion of the learned trial judge as to his preferred version is entirely erroneous on the evidence adduced. For instance, on the access to the apartment it was in fact the evidence of the second appellant that he took the keys in December 1992. Further, it is also quite clear from the evidence of DW9 that he confined his inspection to certain parts of the apartment, specifically the master bedroom and the bathroom. Indeed, we are inclined to agree with the submission of the learned public prosecutor that there was no reference at all to the third room in the apartment that did not have a bathroom attached. We note that it was during the cross-examination of Azizan that the details on the apartment came to light and the defence did not counter those descriptions. It might have been a different situation if Azizan had given a description of a room with bathroom attached. In fact, this is another piece of the evidence of Azizan that would have swayed any trier of facts that he was indeed relating a real incident and not borne out of imagination or motive.

[236] Incidentally, learned counsel for the second appellant strenuously submitted that evidence were available but were not considered by the learned trial judge such as the receipts and building plans on the renovation works. But hardly any of these alleged documents were tendered as exhibits. And one document that was relied upon quite heavily was IDD 37A. But that document was not admitted as an exhibit. It came into the picture purely for identification purpose. As such, we are inclined to agree with the learned trial judge that it should be excluded as part of the trial record.

[237] The doubt cast upon the testimony of DW4 by the learned trial judge was not without reason. This witness was vague, if not, evasive, on the period taken for the completion of the renovation works. Further, he failed to explain the contents of D35 in that therein showed two mattresses and three divans. Hence, it was not without basis for the learned public prosecutor to submit that the third divan must have been for the third room which had no bathroom attached but already had a bed and mattress at the material time.

[238] As to the observation of the learned trial judge on D35 as being new, we say that he is entitled to make it but we do not think such observation should be a basis for the rejection of its evidential value. On our part, we pause to note that D35 itself may not be the best proof on the purchase of those mattresses and divans. Other than the evidence of the shop that claimed to have sold them, there was nothing to link it to those items. It would not have been simple as mattresses do not have serial or model numbers identification.

[239] On the assertion that there was a failure on the part of the prosecution to cross-examine, the second appellant pertaining to the bed, with respect, we are inclined to agree with the contention of the learned public prosecutor that it was not fatal and necessary since it was already in the evidence of Azizan adduced during his cross-examination that the act was committed on a queen-sized bed. It should also be noted that it was the defence that wanted the learned trial judge to accept the fact that the defence of alibi prevailed. Hence, it should therefore be for the defence to establish it so as to cast reasonable doubt on the prosecution's case and not for the prosecution

to disprove once a mere assertion has been made. Section 103 of the EA 1950 is relevant.

[240] Accordingly, we find no reason to interfere with the conclusion of the learned trial judge that in respect of the first appellant his denial of being in the second appellant's apartment at Tivoli Villa as alleged in the charge should be rejected 'in the face of overwhelming and convincing evidence of Azizan'. As noted earlier for the period between January 1993 and 3 February 1993, no evidence as to his whereabouts was tendered for the first appellant. The defence was contented to rely on the assertion that during that period the apartment at the Tivoli Villa was under extensive renovation. But the finding of the learned trial judge had stated otherwise and which we have no reason to differ. Thus we accept as the correct position that for the period from January 1993 to 3 February 1993 the first appellant failed to establish his whereabouts so as to cast a reasonable doubt to the prosecution's case that he was there. We will deal with the position of the alibi defence and the nature of the evidence tendered for that purpose by the second appellant later on in this judgment.

(b) The defence of fabrication and conspiracy

[241] The issue of fabrication as alleged by the defence is partly connected to the allegation of bad faith in the prosecution of the first appellant. And we have already dealt with this issue hereinabove. But the allegation of fabrication by the defence went further to include an existence of conspiracy to fabricate evidence by a group of persons with vested interest to ensure the downfall of the first appellant. Witnesses were called for that purpose.

[242] In his grounds of judgment, the learned trial judge concluded that from the evidence adduced he was not satisfied that such defence had been substantiated.

[243] Before us, learned counsel for the first appellant submitted that the learned trial judge erred in his conclusion in that, inter alia:

(i) he considered the evidence adduced in isolation and glossed over them instead of adopting a holistic approach with the result that the first appellant received an unfair trial;

(ii) that the learned trial judge was already prejudiced when he said that the issue of fabrication was irrelevant;

(iii) that adverse inference should have been made for the failure by the prosecution to call those mentioned by the witnesses called by the defence in connection with the defence of fabrication and conspiracy instead of merely offering them to the defence;

(iv) that the learned trial judge was too eager to rule as being hearsay, irrelevant or given with motives the testimonies of the witnesses called by the defence;

(v) that the learned trial judge should have taken judicial notice of the Special Branch report that was sent to the Prime Minister in connection with the allegation of sexual misconduct of the first appellant;

(vi) that the statutory declaration of one Umi Halfida (D37) should have been read by the learned trial judge in the light of the other evidence adduced instead of summarily dismissing it;

(vii) that the evidence of the first appellant should have been considered as it detailed the reasons for those involved in the conspiracy to act as they did;

(viii) that the learned trial judge did not give any latitude to the discrepancies in the testimonies of the witnesses called by the defence while he gave so much to the witnesses called by the prosecution; and

(ix) that the learned trial judge should have given the benefit of doubt to the defence where it was due but failed to do so contrary to established legal principles.

[244] In reply, the learned public prosecutor submitted, inter alia:

(a) that before any evidence can be admitted it should be relevant to the issue at hand. Sections 11 and 15 of the EA 1950 were referred;

(b) that the learned trial judge was justified in either ruling the evidence of the witnesses called by the defence as hearsay or unbelievable due to the nature of the evidence and its quality; and

(c) that there were glaring contradictions in the evidence of some the witnesses called by the defence.

[245] Now, further to what we have stated earlier on we note that the charge against the first appellant is for sodomizing Azizan. Yet no where in the testimony and the statutory declaration of DW31 was it ever revealed that it was for that offence that the two learned deputies public prosecutor were referring to when they were alleged to have asked him to get his client to fabricate evidence. Indeed, the impression that was given by DW31 was that short of fabricating evidence his client had nothing at all to say.

[246] However, it was not disputed that the client of DW31 gave his police statement subsequently. Again nowhere it was alleged by DW31 that the contents of such statement were fabricated or they were remotely connected to the nature of the offence for which the first appellant was charged.

[247] We are therefore inclined to agree with the conclusion of the learned trial judge and as submitted by the learned public prosecutor before us that such matters alleged and the statutory declaration of DW31 were irrelevant to the issue at hand. Accordingly we find no merit in the complaint of the first appellant in relation to this issue.

[248] It was also the complaint of learned counsel for the first appellant that the learned trial judge failed to mention, let alone consider the affidavits of Dr. Munawar Ahmad Anees (D53) and Dato' Nallakaruppan (D54).

[249] With respect the learned trial judge did consider them and came to his finding that they were irrelevant as they did not make any reference to what was being alleged in the charge preferred against the first appellant. At any rate we would say that such affidavits provided little or no evidential

value at all when compared to the gravity of the allegation hurled against the two learned deputies who are also officers of the court. It would be a tragedy if such allegation could be lightly established by a mere affidavit, shielded from any cross-examination by the affected party.

[250] As regards the other witnesses including the first appellant called by the defence purportedly to show the existence of a conspiracy to fabricate evidence against the first appellant, we note that the learned trial judge analyzed their testimonies carefully and gave his reasons for being unable to accept their evidence as credible. Such assessments and findings should be given due respect and weight unless they are so incredible that no reasonable trier of facts or tribunal would have made them (see *Herchun Singh & Ors v Public Prosecutor*; *Lai Kim Hon & Ors v Public Prosecutor*). We heard no assertion that such was the case here. The closest to that was the submission by learned counsel for the first appellant that the learned trial judge was not being fair in that he was lenient in his reception to the evidence of the witnesses for the prosecution while the slightest mistake as to the date made by DW15 — DSP Zull Aznam resulted in the rejection of his evidence.

[251] With respect we are unable to agree with the contention of learned counsel for the first appellant that the learned trial judge was not being fair in the disposal of the evidence of the witnesses called by the defence. As to the testimony of DW15 we note that the learned trial judge examined his evidence in detail and gave his reasons one of which was the discrepancy in the date before refusing to believe him. We find nothing wrong in that exercise.

[252] We are also unable to find any gross error in the finding of the learned trial judge when he refused to believe the allegations and assertions of DW6 — Raja Kamaruddin bin Raja Abdul Wahid and DW19 — Jamal Abdur Rahman. For instance DW6 in his evidence not only contradicted himself but also made his version so inherently improbable for a reasonable tribunal to accept. At one point he said that he was told by none other than one Dato' Aziz Shamsuddin himself that he was about to fabricate evidence of sexual misconduct against the first appellant. Yet when he confronted the first appellant he posed a question to him, that is, whether it was true that he was involved in sexual misconduct, instead of telling him what he was told. Common sense dictates that DW6, who must have been intelligent enough to be taken by the said Dato' Aziz in confidence, could not have made such move if there was any truth in what he alleged. And the reported reaction of the first appellant when asked indicated the improbability, unless of course the first appellant did not want to rebut the allegation, of the tale promoted by DW6. Any sensible person, more so in the position of the first appellant at that time, would have immediately alerted the authorities of what was going on. There was no explanation for not asking DW6 to lodge a police report immediately or soon after. DW6 said that he did not trust the police. But surely, the first appellant could not be heard to say at that time that he too did not have any confidence in the police force.

[253] In all, we are in agreement with the finding of the learned trial judge that none of the witnesses called by the defence ever came near to saying

that evidence was being fabricated to implicate the first appellant of having sodomized Azizan. And if indeed there was a 'mastermind' in the fabrication of evidence directed against the first appellant for the offence he was ultimately charged, there was no reason for the 'shortcomings' in the evidence as alleged by learned counsel for the appellants. Any sensible person preparing a venture to frame another of an offence would have ensured that the key issues were in place to prevent any failure.

[254] Accordingly, we have no reason to interfere with the conclusion of the learned trial judge in respect of the defence of conspiracy and fabrication raised by the first appellant.

The defence of the second appellant — Alibi

[255] Apart from the common grievances raised particularly on the technical issues, the main defence of the second appellant was one of alibi. However, in the course of his submissions, learned counsel for the second appellant conceded that his client did not adduce evidence of alibi. Nevertheless, that concession would be of limited effect since it was found by the learned trial judge that for the period from 4 February 1993 to 31 March 1993 the first appellant had established successfully his whereabouts. And it was not in dispute that the second appellant could rely on the alibi evidence of the first appellant. Hence, that would leave the period from the whole of January 1993 to the 3 February 1993.

[256] For that period, the second appellant relied on the assertion that his apartment at Tivoli Villa was under extensive renovation and thus could not have been the place of incident. We have already dealt with this issue in respect of the defence of the first appellant and our view remains the same for the second appellant.

[257] Apart from our above view, there is one more issue respecting the defence of alibi of the second appellant. Admittedly, we have expressed our concurrence with the learned trial judge as to the validity of the notice of alibi served by the second appellant after the May 1992 charge was preferred against him notwithstanding the subsequent amendment. It was the contention of learned counsel for the second appellant that the said notice expired upon amendment of the May 1992 charge.

[258] In the event that we are wrong in concurring with the view of the learned trial judge and that the contention of the learned counsel for the second appellant prevails, we agree with the submission of the learned public prosecutor before us that the second appellant suffered no prejudice by the refusal of the learned trial judge to adjourn the hearing. Indeed, it is material to consider the actual nature of the purported evidence of alibi that was finally adduced. It is only if 'a trial court having considered the evidence put forward by the defence holds that such evidence amounts to evidence in support of an alibi for which no notice under s 402A Criminal Procedure Code has been given, then he has no discretion in the matter but to exclude such evidence' and it is evidence of alibi if it 'shows or tends to show that by reason of the presence of the accused at some particular place or area at

a particular time he cannot be or is unlikely to be at the place where the offence is committed. ... that 'a true alibi defence consists of a affirmative proof of the defendant's presence somewhere other than at the time and place alleged.')' per Abdul Hamid FJ (as he then was) in *Ku Lip See v Public Prosecutor* at p 196. Otherwise evidence adduced by an accused in defence may be 'in essence a complete denial of the prosecution case' wherein a trial judge may treat it as purely a question of fact thereby making the issue of notice of alibi quite irrelevant.

[259] Thus, in the present case with the concession by the learned counsel for the second appellant as stated hereinabove the issue of notice of alibi becomes plainly academic. In any event, the learned trial judge allowed the second appellant to adduce all the evidence which was probably thought at that point in time to be evidence of alibi when it was not. Notwithstanding, the nett effect of such acquiescence was that the second appellant suffered no prejudice even with the refusal of the adjournment applied for. It is therefore our considered opinion that the contention of the learned counsel respecting the refusal by the learned trial judge to grant the adjournment applied for with the view to serve a fresh notice of alibi is without merit. And even if indeed an adjournment should have been granted at that point in time as it was not known then the nature of the alibi evidence to be adduced, in view of what subsequently transpired we are of the view that in the circumstances of this present case the invocation of the proviso to s 60(1) of the CJA would be appropriate.

[260] Learned counsel for the second appellant also touched on P4 as having been retracted and thus of no evidential value.

[261] We have already dealt with this matter hereinabove and say no more.

Abetment charge against the second appellant

[262] On the charge of abetment learned counsel for the second appellant submitted that the learned trial judge erred in convicting his client since there was no evidence to support such charge. It was contended that if the second appellant had intended to lure Azizan to the apartment he would have informed him of the address. Further, it was argued that the mere presence of the second appellant did not make him an aider and abettor.

[263] On this charge, it was a finding of fact by the learned trial judge that 'the prosecution has proved beyond a reasonable doubt that in fact and in law Sukma abetted Dato' Seri Anwar in the commission of the act of sodomy on Azizan as particularized in the first charge against Sukma'. And he relied on the following:

(i) the evidence of Azizan that he was invited by the second appellant to the latter's apartment without being informed that the first appellant would be present;

(ii) in P4 the second appellant admitted that at the request of the first appellant he took the latter to his apartment to meet Azizan; and

(iii) that from the evidence of Azizan and P4 the second appellant was present when the first appellant sodomized Azizan.

[264] On the evidence before him, it was the conclusions of the learned trial judge that the acts of the second appellant in inviting Azizan to the apartment and making arrangement for the first appellant to be present to sodomize him (Azizan) were:

(a) 'acts which connect Sukma (the second appellant) with the steps of the transaction which are criminal';

(b) 'acts which show that Sukma intentionally aided and abetted the commission of the offence as envisaged under the third limb of s 107 of the Code (the Penal Code) and are also acts done by Sukma to facilitate the commission of the offence under explanation 2 of s 107 of the Code'; and

(c) the 'evidence of active complicity on the part of Sukma and is caught by s 109 of the Code'.

[265] It was also the finding of the learned trial judge that by evidence it was established 'that Sukma was voluntarily and purposely present witnessing the commission of the offence by Dato' Seri Anwar and offered no opposition to it or at least to express his dissent. Thus, the presence of Sukma cannot be taken to mean mere presence but more to it, it would under the circumstances afford cogent evidence which would justify this court in finding that Sukma wilfully encouraged the commission of the offence and so aided and abetted it.'

[266] Now, in *Public Prosecutor v Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180 at p 196, his Lordship Abdoolcader J (as he then was) opined that there are three limbs in s 107 of the Penal Code namely, 'abetment by instigation, conspiracy and intentionally aiding'. And he went on to explain each of the limbs in this way:

> Instigation consists of acts which amount to active suggestion or support or stimulation for the commission of the main act or offence. Advice can also become instigation if that advice is meant to actively suggest or stimulate the commission of an offence (*Ragunath Das v Emperor* [1920] 21 Cr LJ 213). Abetment by conspiracy consists in the combination and agreement of persons to do some illegal act or to effect some illegal purpose by illegal means. Proof of conspiracy need not be direct proof but can be a matter of inference deducted from certain criminal acts of the accused done in pursuance of an apparent criminal purpose in common between them (*Emperor v Abdul Hamid* [1945] 46 Cr LR 342). Abetment by aiding takes place when a person by the commission of an act intends to facilitate and does in fact facilitate the commission of an offence (*Faguna Kanta Nath v State of Assam* AIR 1959 SC 673). Where there is shown a positive act of assistance voluntarily done by a person with a knowledge of the circumstances constituting the offence, the abettor is guilty of abetment by aiding (*National Coal Board v Gamble* [1959] 1 QB 11).

[267] The learned trial judge in the present case may not have clearly stated which limb or limbs the acts and omissions of the second appellant came under. However, in our view it can be discerned from his findings that the

least such acts or omissions can come under should be the third limb. It was the evidence of Azizan that he was invited by the second appellant to come to his apartment without informing him that the first appellant would be there too. And in P4 the second appellant admitted to have picked up the first appellant and brought him to his apartment to meet Azizan. Further, in P4 as well the second appellant admitted to have invited Azizan to his apartment at the behest of the first appellant. These pieces of evidence all pointed to the fact that the second appellant facilitated and did facilitate in the commission of the offence of sodomy by the first appellant.

[268] Otherwise generally speaking, the acts and omissions of the second appellant can come under all the limbs in s 107 of the Penal Code. In any event, by the mere failure of the learned trial judge to clearly indicate the limb or limbs we do not think the second appellant has been prejudiced in anyway. More so when the findings of the learned trial judge are findings of facts in which an appellate court and we are, has limited reasons to interfere (see *Public Prosecutor v Wan Razali Kassim)*.

[269] In fact, in criticizing the findings of the learned trial judge respecting the evidence against the second appellant for the first charge, it was also a criticism on the learned trial judge, albeit indirectly, on his assessment of Azizan as a witness and the nature of his testimony and the admission of P4 and the truth therein. We have already expressed our views on these crucial points and we say no more. Suffice it for us to state here that we find no serious errors in the approach and assessment by the learned trial judge of the evidence adduced by both sides in respect of the first charge preferred against the second appellant. We also find no flaw in his application of the evidence to the ingredients of the offence with reference to decided cases such as *Ferguson v Weaving* [1951] 1 KB 814; *The Queen v Coney & Ors* (1882) 8 QBD 534 and *Public Prosecutor v Tee Tean Siong & Ors* [1963] MLJ 201 (see also *Public Prosecutor v Datuk Tan Cheng Swee & Ors* [1979] 1 MLJ 166).

[270] Accordingly, we find no merit in the ground of appeal and submissions of learned counsel for the second appellant against the conviction of the second appellant on the charge for abetment.

Other points considered

[271] We are conscious that there are other points raised in respect of all the convictions by the learned counsel for the appellants and the learned public prosecutor which we have not specifically dealt with in this judgment. However, we state here that we have in fact considered them before coming to our decision. And even if some of our views on those points might be in tandem with the contentions of learned counsel for the appellants, we say that those points in our views are not of material nature as to have any effect to our decision as a whole in these appeals. In any event, we would say that generally we agree with the findings and conclusions of the learned trial judge on those points.

The application of the proviso to s 60(1) of the CJA

[272] In respect of the application of the proviso to s 60(1) of the CJA, it was the submission of learned counsel for the first appellant that it should only be applied in exceptional cases. He cited the case of *Abdillah bin Labo Khan v Public Prosecutor* [2002] 3 MLJ 298. It was also his plea that to apply the proviso would cause substantial miscarriage of justice in view of the evidence of Azizan.

[273] We do not think there is any dispute as to the application of the said proviso. That has been made clear in a series of cases by this court. Our Federal Court has a similar proviso applicable thereto. Thus, very well aware of such principle of law we have deliberated carefully on the overall nature of the evidence in these appeals and the approach adopted by the learned trial judge. Admittedly, there may be some misdirections on his part, for instance his reliance on P4 as against the first appellant. We have addressed that issue. There is also the issue of s 402A of the CPC that became one of the main planks to the contentions of the appellants in these appeals. Nevertheless, having considered the totality of the evidence adduced, the submissions of learned counsel for the appellants and the learned public prosecutor and having read and re-read the grounds of judgment of the learned trial judge and on the facts and in the circumstances of these appeals heard jointly, it is our considered opinion that no substantial miscarriage of justice has occurred and based on our views given above we consider it an exceptional case, hence it is a fit and proper case to apply the proviso to s 60(1) of the CJA (see *Basil bin Omar v Public Prosecutor* [2003] 1 MLJ 192; *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259; *K Saravanan a/l S Karuppiah v Public Prosecutor* [2002] 3 MLJ 465).

Overall conclusion

[274] For the above reasons, we dismissed the appeals by both the appellants against their convictions on the charges preferred against them respectively.

On sentence

[275] In submitting for the first appellant, learned counsel referred to s 25 of the Syariah Courts (Criminal Jurisdiction) Act 1965 wherein for an offence of sodomy the maximum punishment is three years imprisonment, a fine of RM5,000 and strokes. And it was his contention that indeed there is a great disparity in term of sentence with s 377B of the Penal Code. It was also submitted that the sentence of nine years imprisonment is manifestly excessive. And it was also contended that the previous conviction of the first appellant should not be taken into account as there is still a pending application for its review.

[276] For the second appellant, it was submitted that the sentences imposed are manifestly excessive. It was also contended that the imposition of the strokes was unnecessary since such punishment should only be meted out where violence was involved in the commission of the crime which was absent in this case.

[277] It is settled law that an appellate court should not interfere in a sentence imposed by a trial court unless it is satisfied that such sentence is manifestly inadequate or excessive or illegal or otherwise not a proper sentence having regard to all the facts and circumstances disclosed or that the court below has clearly erred in applying the correct principles when assessing the sentence to be imposed (see *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256). In these appeals, the only complaint is that the sentences of imprisonment or the length thereof are manifestly excessive. And for the second appellant it was highlighted that there was no violence involved. But it is not for an appellate court to interfere a sentence imposed merely because it would have passed a different sentence (see *Public Prosecutor v Fam Kim Hock* [1957] MLJ 20).

[278] As to whether or not a sentence imposed is excessive, such issue has to be premised on the fact that in imposing sentence a trial judge is exercising his discretion. And we can do no better than to echo the view of Raja Azlan Shah (Ag LP) (as His Royal Highness then was) in the case of *Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83 where his Lordship said at p 84:

> As this is an appeal against the exercise by the learned judge of a discretion vested in him, is the sentence so far outside the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description? I have had occasion to say elsewhere, that the very concept of judicial discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions (see *Jamieson v Jamieson* [[1952] AC 525). It is for that reason that some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others, equally conscientious, have thought it their duty to view the same crimes with leniency. Therefore sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is for that reason also that this court has said it again and again it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient *per se* to warrant this court's interference.

[279] In the present case, we note that before imposing the sentences on the appellants the learned trial judge considered several matters. In respect of the first appellant, the learned trial judge took into account the following:

(i) that the first appellant did not show at all any sign of remorse, instead displayed an attitude of arrogance and attack on the Bench and his purported political rivals;

(ii) the seriousness of the offence as reflected by the penalty provided;

(iii) the lofty status and the position of responsibility of the first appellant at the material time and the need to exemplify high moral standard;

(iv) the fact that due to the age of the first appellant no whipping is allowed but the alternative is for a longer term of imprisonment that may be imposed;

(v) that the first appellant has a previous conviction;

(vi) that the sentence has to be made consecutive to the then sentence being served by the first appellant since the offence of sodomy is quite distinct from the offence in his previous conviction;

(vii) that the service of the first appellant to the nation has been taken into account although there was hardly any mitigating factors submitted on his behalf; and

(viii) that the length of sentence of imprisonment is reflective of the seriousness of the offence for which the first appellant has been convicted.

[280] From the foregoing and in respect of the first appellant, we are of the view that the learned trial judge has taken all the relevant factors into consideration in the process of sentencing. Public interest demands such considerations. There is no denial that the first appellant had engaged to defend him no less than a team of senior counsel with vast knowledge and experience in criminal work. All conceivable arguments were taken up. All grievances, both justified and unjustified, against anyone that could be remembered, were allowed. We agree with the approach adopted by the learned trial judge.

[281] As to the argument that the previous conviction of the first appellant should not be taken into account for the moment since there is a pending review, with respect that is not for us to judge at this stage. In so far as this court is concerned that conviction has been upheld by the highest court of the country and that is the position until it is reversed. There is therefore no merit in that contention and we reject it.

[282] Accordingly, we find no reason to interfere with the sentence passed by the learned trial judge on the first appellant and hereby affirm it. His appeal against sentence is therefore dismissed.

[283] As for the second appellant, the learned trial judge considered these:

(a) the fact that a sentence of whipping can be imposed, hence that attracts lesser term of imprisonment;

(b) that the health reason of the second appellant is a matter for the medical authority to consider in respect of the execution of the sentence of whipping;

(c) that the learned trial judge found no compelling reason for a lighter sentence for the second appellant; and

(d) that for the two convictions the learned trial judge imposed concurrent sentences of imprisonment.

[284] We note that the learned trial judge did not take into account the fact that the second appellant has one previous conviction related to the offence of sodomy as well. Be that as it may, we are not convinced that the learned trial judge erred in any way in his process of sentencing the second appellant. And for the same reason, we stated in respect of the first appellant we find no ground to interfere with the sentences imposed on the second appellant by the learned trial judge in the exercise of his discretion. Accordingly, we also dismiss his appeal against sentence and affirm the sentences passed by the learned trial judge.

Appeals dismissed.

Reported by Sivapragasam Kumaran